

Mallesha vs the Branch Manager

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Court : Karnataka

Decided On : May-28-2024

Judge : T.G. Shivashankare Gowda

Appeal No. : MFA/2290/2012

Appellant : Mallesha

Respondent : The Branch Manager

Judgement :

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF MAY, 2024 BEFORE THE HONBLE MR. JUSTICE T.G.SHIVASHANKARE GOWDA MFA NO.2290 OF 2012 (MV-I) BETWEEN: MALLESHA S/O MADAPPA AGED ABOUT 40 YEARS R/AT MENASKYATHANALLI VILLAGE, T.NARASIPURA TALUK MYSORE DISTRICT APPELLANT (BY SMT. ASHA B. L., ADV.) AND:

1. THE BRANCH MANAGER ORIENTAL INSURANCE CO. LTD. D.O-2 NO.2903, 1ST FLOOR NEW MUSLIM HOSTEL COMPLEX 1ST MAIN, SARASWATHIPURAM MYSORE

2. B.SHASHIKUMAR

S/O BOREGOWDA, D.NO.810 SWARNASANDRA, MANDYA RESPONDENTS (BY SRI.R.GUNASHEKAR, ADV. FOR R1; SRI. RAMESH KUMAR R.V., ADV. FOR R2) THIS MFA IS FILED UNDER SECTION 173(1) OF MV ACT AGAINST THE JUDGMENT AND AWARD DATED 28.09.2011 PASSED IN MVC NO.363/2008 ON THE FILE OF ADDITIONAL CIVIL JUDGE (SR.DN.) & CJM, MACT, MANDYA, PARTLY ALLOWING THE CLAIM PETITION FOR COMPENSATION AND SEEKING ENHANCEMENT OF COMPENSATION. THIS MFA HAVING BEEN HEARD AND RESERVED FOR

JUDGMENT ON 23.04.2024 AND COMING ON FOR

PRONOUNCEMENT OF JUDGMENT THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

In this appeal, the petitioner has challenged the

judgment and award dated 28.09.2011 in

M.V.C.No.363/2008 passed by the Additional Civil Judge (Sr.Dn.) & CJM., and M.A.C.T., Mandya ('the Tribunal' for short).

2. Appellant was the petitioner, respondent No.1

was respondent No.2/insurer and respondent No.2 was respondent No.1/insured before the Tribunal. For the sake of convenience, the parties shall be referred to as per their status before the Tribunal.

3. Brief facts of the case are, on 12.04.2008, the

petitioner being the passenger of the auto rickshaw bearing registration No.CTS-7695 met with an accident at 5.30 p.m. near Mahaveera circle on Mysore-

Bangalore Road at Mandya City when the driver of the said auto rickshaw attempted to avoid cyclist, due to which the auto was capsized on the road, the petitioner sustained injuries. After taking treatment at Government Hospital, Mandya and J.S.S. Hospital, Mysore, approached the Tribunal for grant of compensation of Rs.5,55,000/-. Claim was opposed by respondent No.1 on the ground that the driver of the auto rickshaw did not possess valid driving licence. The Tribunal after holding enquiry and hearing both the parties allowed the claim petition awarding compensation as follows:

Sl. No.	Particulars	Rs.	1
	disability Total 1,44,400/- The Tribunal directed the owner of the auto rickshaw to deposit the compensation with interest at 6% p.a. Pleading inadequacy and seeking enhancement and also questioning exoneration of Insurance Company, the petitioner has filed this appeal on various grounds.		

4. Heard the arguments of

Smt.Asha B.L., learned counsel for the petitioner, Sri.R.Gunashekar, learned counsel for the Insurance Company and Sri.Ramesh Kumar.R.V., learned counsel for the owner of the auto rickshaw.

5. It is the contention of learned counsel for the

petitioner that the Tribunal though considered various aspects while assessing the compensation in a case where the petitioner is injured, suffered physical disability, without considering these aspects awarded compensation under only three heads, which is

inadequate. In spite of placing medical evidence, the percentage of disability assessed is also on the lower side. The income taken by the Tribunal at Rs.4,000/- per month is also on the lower side and sought for enhancement. It is further contended that the driver of the auto rickshaw was holding effective driving licence, but non-renewal of fitness certificate (FC) is

not a violation of policy and the Tribunal has committed error in exonerating the Insurance Company and sought for interference.

6. Per contra, learned counsel for the Insurance Company has contended that the petitioner has suffered simple fracture, post-treatment he has recuperated from the injuries, no physical disablement,

there is no proof of avocation and income. The Tribunal has considered notional income at Rs.4,000/- per month, assessed just compensation having regard to the gravity of injuries and there is no need for enhancement, on the date of accident, the driver did not possess valid driving licence and there was no FC for the auto, it amounts to violation within the meaning of Section 147 of Motor Vehicles Act, 1988, Insurance Company has no liability to pay the compensation and he supported the impugned judgment.

7. It is the contention of learned counsel for the

owner of the auto that on the date of accident, the driver did possess valid driving licence and on the date of issuance of policy, FC was in force, Insurance Company cannot raise defence under Section 147 of Motor Vehicles Act for expiry of FC and it has to indemnify the insured.

8. I have given my anxious consideration to the arguments addressed on behalf of both sides and also perused the records.

9. The material on record points out that there was an accident involving the auto rickshaw and

cyclist. At Mahaveer circle of Mandya city on 12.04.2008 at 5.30 p.m., the driver of the auto rickshaw in order to avoid hitting against the cyclist applied sudden brake, due to which, the auto rickshaw was capsized and the petitioner has sustained injuries over his lips, eyes, nose, hands, knees and ears. He has suffered fracture of radius and there is a tear of left ear pinna measuring 8 x 2 cm. For the reason of actionable negligence on the part of the driver of the auto rickshaw, he has been prosecuted by the Mandya Traffic Police in Crime No.70/2008 for the offences punishable under Sections 279 and 337 of IPC and

Section 134(b) of the Motor Vehicles Act, 1988. The injury certificate issued by the Government Hospital, Mandya and J.S.S.Hospital, Mysore clearly points out and ratifies the fracture of left radius and also tearing of left ear pinna. The driver of the auto rickshaw has also been charge sheeted in C.C.No.885/2008 before the Additional Civil Judge (Sr.Dn.) & CJM., Mandya for the said offences only. Petitioner being the passenger of the auto rickshaw, no question of attributing any contributory negligence would arise. Hence, sufficient material is placed before the Tribunal to explain that the accident was due to actionable negligence of the driver of the auto rickshaw in which the petitioner has sustained injuries.

10. PW-2/Dr.H.K.Raghu is a Junior Resident of Surgery Department, Mandya Institute of Medical Sciences, Mandya, who has given first aid to the petitioner soon after the accident.

11. PW-3/Dr.Y.Shashikumar, Assistant Professor

of J.S.S.Hospital, Mysore, who has treated the petitioner, is of the opinion that the petitioner has suffered limb disability of $16\% + 14\% \times 7.5\% = 37.5\%$. With reference to the wound certificate at Exs.P4 and P5, ENT as well as Orthopedic Surgeons have treated the petitioner and the Tribunal has assessed 12% whole body disability. The petitioner has suffered fracture of left wrist joint and there is tearing of ear pinna, which certainly affects the earning capacity of the petitioner and the Tribunal has rightly assessed 12% disability to the whole body.

12. The petitioner is entitled to claim just

compensation for the injuries sustained by him. The Tribunal did not consider to award compensation on other various heads. It is pertinent to note that in a case of injury, compensation has to be assessed

towards pain and suffering, medical expenses, attendant charges, food and nourishment, conveyance expenses, loss of amenities and discomfort and loss of income during laid-up period and loss of future income. But the Tribunal has only considered medical bills, disability and pain and suffering. Hence, it requires re-assessment of compensation.

13. The accident is of the year 2008 and the

petitioner claims that he is an agriculturist; without any proof of income, having regard to the minimum wages and the earning capacity of the petitioner, who is aged 40 years, his notional income ought to have been taken at Rs.4,500/- instead of Rs.4,000/- taken by the Tribunal. While assessing the future income, the principles laid down by the Hon'ble Apex Court in National Insurance Co.Ltd. -Vs- Pranay Sethi and Others¹ has to be considered for adding future income as we have to assess the loss of future income and not the present or past income. For the age of 40, the applicable multiplier is '15' and 25% has to be added as future prospects in order to calculate the loss of future earning. Then it comes to Rs.4,500/- +

(2017) 16 SCC 680 Rs.1,125/- (25%) = Rs.5,625/- x 12 x 15 x 12% = Rs.1,21,500/-.

14. The petitioner has produced the medical bills

as per Ex.P8, which comes to Rs.5,327.49 paise. Hence, the medical bills has to be considered at Rs.6,000/-. The petitioner has to be awarded a sum of Rs.30,000/- towards pain and suffering; Rs.5,000/- towards attendant charges, travelling expenses and food and nourishment; Rs.30,000/- towards loss of amenities and discomfort. The fracture would have made the petitioner to laid up for minimum of four months. Hence, loss of income during laid up period comes to Rs.4,500/- x 4 months = Rs.18,000/-. The evidence of the petitioner did not suggest assessment of compensation under other heads. Thus, in all the petitioner is entitled to compensation as follows: Sl. Particulars Rs. No.

1	Pain and sufferings	30,000/-	2
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nourishment and travelling expenses	3	Loss of income during laid-up period	18,000/-
4	Loss of amenities and discomfort	30,000/-	
5	Loss of future earnings		
1,21,500/-	Total	2,10,500/-	(-) Award of the Tribunal
1,44,400/-	Enhanced compensation	66,100/-	

This is the just compensation that the petitioner is entitled to in the facts and circumstances of the case.

15. Now the aspect of liability is concerned, there

are two-fold taken by the Insurance Company. Firstly, the driver of the auto rickshaw did not possess valid and effective driving licence and secondly, the vehicle did not have the fitness certificate at the time of

accident. Firstly, regarding driving licence, though such a contention has been taken, in the course of evidence of the Officer of the Insurance Company, so also during the course of cross-examination of the petitioner, driving licence aspect has not been raised. On careful perusal of the prosecution papers, it is pertinent to note that in the charge sheet filed against the driver of the auto rickshaw, there is no mention of any provision regarding driving licence under Section 3 read with Section 181 of the Motor Vehicles Act. Hence, the issue regarding driving licence is thereby answered.

16. Secondly, whether the Insurance Company can avoid its liability on the ground of fitness

certificate. The cross-examination of RW-1 did plead that the auto rickshaw did not hold fitness certificate and it can avoid its liability. Accordingly, the Tribunal accepted the contention of the Insurance Company and directed the owner of auto rickshaw to pay compensation. 16(a) In this regard, the contentions taken on behalf of both sides is carefully evaluated whereas the Co-ordinate Bench of this Court in MFA No.7439/2013 DD 28.02.2019 has considered the similar aspect to the effect that whether the Insurance Company can be exonerated of its liability on the ground that the insured did not possess fitness certificate for the offending vehicle as on the date of accident. After discussing the circumstances elaborately and also

referring several judgments at para-10 of its judgment

held as follows:

"10. The Tribunal while fixing the liability on the insurer placed reliance on the decision of the Kerala High Court in the case of Thara -vs-

Syamala reported in 2009 ACJ 2440. It is pertinent to note that the said decision of the Kerala High Court has been over-ruled by the Full Bench decision in the case of V M Augustine, Vattakavumkal -vs- Ayyappankutty alias Mani & another reported in AIR 2015 Kerala 131. It is held that lapse of certificate of fitness would constitute breach of the provisions of Motor Vehicles Act or Rules. However, there is nothing under Section 56 of the Act, which suggests that the registration or permit issued would stand cancelled or revoked on account of lapse of period of fitness certificate."

16(b). While coming to such conclusion, the Co- ordinate Bench of this Court has referred to the judgments of the Kerala High Court in 2009 ACJ 2440 and AIR 2015 Kerala 131. In view of such finding, the lapse of certificate of fitness could not constitute breach of provisions of the Motor Vehicles Act and Rules.

17. On perusal of the policy as well as the extract

issued by the RTO, Mandya as per Exs.R2 and R3, it is pertinent to note that the policy of insurance commences w.e.f. 000:00 of 27.09.2007 to midnight of 26.09.2008 whereas the RC was lapsed on

18.10.2007. It shows that on the date of Insurance Company issuing Ex.R2/policy, the auto rickshaw was holding valid fitness certificate. The fitness certificate came to be expired on 18.10.2007 whereas the accident took place on 12.04.2008 and thereby the fitness certificate is not in force. Since on the date of issuance of policy, the fitness certificate was in force, the Insurance Company issued the policy knowing fully well that the fitness certificate is going to expire on a particular date.

18. The terms of the policy under Ex.R2 having a

limitation as to use of the vehicle only contemplates sub-section (3) of Section 66 of the M.V.Act, 1988, which does not contemplate any issue regarding the fitness certificate. The policy was not issued subject to fitness certificate, thereby the Insurance Company cannot avoid its liability in the light of the judgments of

Coordinate Bench in Rajesh Poojary's case (supra). Hence, the judgment and award passed by the Tribunal dismissing the claim against the Insurance Company and directing the insured to pay compensation is liable to be set aside and the Insurance Company cannot

avoid its liability to pay compensation. Thereby the appeal merits consideration. In the result, the following:

ORDER

i) The appeal is allowed-in-part; ii) Impugned judgment and award is modified; iii) The petitioner is entitled to enhanced compensation of Rs.66,100/- with interest @ 6% p.a. from the date of petition till the date of deposit; iv) Both the respondents are held liable to pay the compensation. The Insurance Company is directed to deposit the total compensation within eight weeks from the date of receipt of certified copy of this judgment; v) Amount in deposit, if any, shall be transmitted to the Tribunal along with records forthwith.

Sd/- JUDGE KNM/- CT:HS

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