IN THE HIGH COURT OF KARNATAKA, BENGALURU

THE HON'BLE MR. JUSTICE MOHAMMAD NAWAZ

MISCELLANEOUS FIRST APPEAL NO.9010 OF 2009 [MV] DATED:21-01-2019

UNITED INDIA INSURANCE CO. LTD., DIVISIONAL OFFICE-II, MYSORE VS. PRABHU, S/ O. LATE PUTTASWAMY AND OTHERS

JUDGMENT

The appellant/Insurance Company has preferred this appeal challenging the Judgment and Award dated 04.08.2009 passed by the Fast Track Court- I and Additional Motor Accident Claims Tribunal at Mysuru, in M.V.C. No.30/2007, whereby the claim petition filed by respondent No.1 herein was partly allowed and he was awarded with gicbal compensation of Rs. 2,41,000/-with interest at the* 99* rate of 6% p.a. from the date of the petition till the date of payment.

2. I have heard Sri. A.N.Krishna Swamy, learned counsel appearing for the appellant and Sri. P.Nataraju, learned counsel appearing for respondent No.1.Though respondent No.3 is served, he is unrepresented.

3. Respondent No.1-claimant filed a claim petition before the Tribunal, seeking a total compensation of Rs.5,85,000/-with interest, in respect of the injuries suffered by him in a road traffic accident, which took place on 23.01.2000 at about 8.30 am. near Mandakalli Tank, Mysuru Octy Road.

4. It is case of the claimant that on 23.01.2000, while he was traveling in a maxi cab bearing reg.No.KA 11/2448 along with his friend, from Mysuru to Coty, near Mandakalli Tank, the said maxi cab dashed against a lorry, which was coming from the opposite direction and on account of the said accident, he sustained crush injuries to his right hand and multiple fractures of right upper limb etc. Soon after the accident, he was shifted to J.S.S. Hospital, Mysuru, wherein he was under treatment as an in-patient from 23.01.2000 to 23.02.2000 and again admitted to the said hospital for further treatment and took treatment as an in-patient from 15.03.2000 to 20.03.2000. Further that, he underwent surgery and implants were placed to his fractured bones and he being an agriculturist, cannot do any such work.

Before the Tribunal, the driver and the owner of the maxi cab remained absent and they were placed ex-parte. The claim petition was contested by the appellant/Insurance Company.

The claimant got examined himself as P.W.1 and got examined the doctor who treated him as P.W.2 and got marked Exs.P1 to 19. On behalf of the respondents, R.W.1, an Officer of the Insurance Company was got examined and Ex.R1 was act got marked.

5. The Tribunal framed the following issues:

" 1) Whether the petitioner proves that the alleged accident was occurred only due to the rash and negligence on the part of the driver of maxi cab bearing regn. No.KA11 2448 that is, R2 resulted in grievous hurt as on the alleged date, time and place?

2) Whether the 3rd respondent proves that the alleged accident was occurred only due to the rash and negligence on the part of the driver of unknown lorry as on the alleged date, time and piace?

3) Whether the accident occurred due to composite negligence of R2 and the driver of unknown lorry?

4) Whether the petitioner is entitled for compensation?If so what is the quantum and against whom?

5) What order? "

6. While answering the aforesaid issues framed by the Tribunal, it arrived at a conclusion that the alleged accident occurred due to composite negligence of the drivers of both the vehicles and after computing the compensation, awarded a total sum of Rs. 2,41,000/-for the injuries sustained by the claimant.While considering the percentage of negligence of each vehicle, the Tribunal held that the negligence of unknown lorry driver is to the extent of 65% and negligence of the driver of the maxi cab is concerned, it is about 35%. Further, relying upon a decision reported in ILR 2004 KARNATAKA 26 in the case of KARNATAKA STATE ROAD TRANSPORT CORPORATION, BY ITS MANAGING DIRECTOR VS. ARUN @ARAVIND AND OTHERS, the Tribunal held that both the vehicles are joint tort feasers and therefore, respondent Nos.1 to 3 therein are jointly and severally liable to pay the entire compensation to the injured and observed that they can recover 65% of the compensation from the owner or insurer of the unknown lorry after tracing the said vehicle.

7. The learned counsel appearing for the appellant assailing the aforesaid order passed by the Tribunal contended that the Tribunal has committed a serious error in coming to the conclusion that the accident occurred due to the composite negligence on the part of the drivers of the maxi cab and unknown lorry as there is no material to indicate that the driver of the maxi cab had in anyway contributed to the accident. He contended that the driver of the unknown lorry alone was responsible for causing the accident and therefore, the finding of the Tribunal to the effect that the driver of the maxi cab was negligent to the extent of 35% is impermissible in law. It is his further contention that the claimant has not impleaded the owner and insurer of the lorry in question and hence awarding a total compensation of Rs.2,41,000/-and further proceeding to hold that the appellant/insurer is liable to pay the entire compensation and can recover the said amount from the owner of the unknown lorry is not sustainable. Accordingly, he seeks to allow the appeal.

On the other hand, learned counsel appearing for respondent No.1 contended that when an accident takes place involving two or more vehicles, then the compensation can be recovered by claimant/ s from any one of the joint tort feasors as held by this Court in the case of KARNATAKA STATE ROAD TRANSPORT CORPORATION, BY ITS MANAGING DIRECTOR VS. ARUN @ARAVIND AND OTHERS [supra].He would submit that only joint tort feasors on record is bound to pay the compensation awarded and the question of apportionment of

blameworthy in the absence of that joint feasor does not arise. Learned counsel placing reliance on a decision of the Hon'ble Apex Court in the case of KHENYEI Vs. NEW INDIA ASSURANCE COMPANY LIMITED AND OTHERS reported in [2015] 9 Supreme nepa Court Cases 273 contends that it is not necessary to implead all joint tort feasors and due to failure of impleadment of all joint tort feasors, compensation cannot be reduced to the extent of FS negligence of the non impleaded tort feasors. Accordingly, seeks to dismiss the appeal.

8. Respondent No.1 is the injured/claimant. It is the case of the claimant that while he was proceeding in the maxi cab bearing reg.No.KA-11/2448 on 23.01.2000, the said vehicle dashed against a unknown lorry on Mysuru Ooty road, near Mandakalli Tank and on account of the said accident, he sustained grievous injuries to his right hand and sustained multiple fractures on right upper limb. According to him, he was an in-patient from 23.01.2000 to 23.02.2000 and again he was an in-patient from 15.03.2000 up to 20.03.2000 at J.S.S. Hospital, Mysuru. The claim petition was filed against the owner, driver and insurer of the maxi cab bearing reg. No.KA-11/2448.According to the claimant, soon after the accident, the said lorry did not stop and went away. Hence, there was no particulars available with regard to the said vehicle and therefore, the driver, owner and the insurer of the said lorry were not impleaded as the respondents.

9. The Tribunal, taking into consideration the first information report as well as the other evidence and material on record was of the view that the unknown lorry had come from the opposite direction in a negligent manner hamm and dashed the right side of the maxi cab and went away and in the said accident, the appellant herein, Suresh i.e., driver of the maxi cab sustained injuries. The Tribunal arrived at a conclusion that the accident occurred on account of errors of drivers of both the vehicles and therefore held that, the accident occurred due to composite negligence of drivers of both the vehicles.

10. The aforesaid finding recorded by the Tribunal is based on the evidence and material on record and also considering the first information report and in particular, Ex.P3-spot sketch and Ex.P4-spot mahazar. I do not find any error in the said finding recorded by the Tribunal.

11. The injured had sustained crush injury to his right upper limb radial pulse of right upper limb. The X-ray discloses that comminuted fracture of right elbow, fracture of humerus and fracture of ulna mid shaft with fracture of 3, 4 5th metacarpal. Immediately after the accident, the injured was admitted to the hospital and discharged on 23.02.2000 and for further treatment he was again admitted to the hospital on 15.03.2000 and discharged on 20.03.2000.Considering the material on record, the Tribunal has come to the conclusion that the injured was under treatment as an in-patient for about 40 days and underwent surgery several times. The said fact could be seen from Ex.P8-inpatent bills. Taking into consideration the medical bills-Ex.P10, the Tribunal awarded a sum of Rs.17,500/-towards medical expenses. Further, considering the nature of the injuries sustained, a sum of Rs. 25,000/-was awarded under the head of pain, suffering and mental agony. A sum of Rs.10,000/-was awarded towards incidental charges; food, nourishment, attendant charge and conveyance. A sum of Rs. 15,000/-was awarded towards loss of income during the period of treatment i.e., for six months. Further, a sum of Rs.20,000/-was awarded towards loss of amenities and enjoyment of life.

Towards loss of marriage prospects Rs. 15,000/-was awarded. Towards loss of future earnings or earnings capacity, a sum of Rs.1,38,000/-was awarded. Hence, the Tribunal in all awarded compensation of Rs 2,40,500/-which was rounded off to Rs. 2,41,000/-.

12. It is pertinent to note that the claimant had preferred M.F.A. No.7547/2009 [MV], seeking enhancement of compensation awarded by the Tribunal and this Court by its Judgment dated 27.06.20013 was pleased to allow the said appeal in part and modified the Award passed by the Tribunal and awarded an additional compensation of Rs.1,03,680 3/-with interest at 6% p.a.

13. The only question which arises for consideration in this appeal is;

Whether the Tribunal was proper in holding that both the vehicles are joint tort feasors and the respondents before the Tribunal are jointly and severally liable to pay the entire compensation amount to the claimant and then they are at liberty to recover 65% from the owner or insurer of the unknown lorry?

14. The Hon'ble Apex Court in in the case of KHENYEI Vs. NEW INDIA ASSURANCE COMPANY LIMITED AND OTHERS [supra] has held at paras 10 to 13 as under:

" 10. A Full Bench of the High Court of Karnataka at Bangalore in Karnataka SRTC v. Arun has med the decision of another Full Bench of.the le High Court in Ganesh v. Syed Munned Ahamed.A Division Bench referred the decision in Ganesh case on the following two questions to the larger Bench:(Arun case, SCC OnLine Kar para 3)

(1) If the proceedings are finally determined with an award made by the Tribunal and disposed of in some cases by the appeal against the same by the High Court, does the Tribunal not become functus officio for making any further proceedings like impleading the tortfeasor or initiating action against him legally impermissible?

(2) What is the remedy of a tortfeasor who has satisfied the award, but who does not know the particulars of the vehicle which was responsible for the accident? "

11. A Full Bench in Karnataka SRTC v. 2 Arun while answering the aforesaid questions has observed that it was a case of composite negligence and the liability of feasors was joint and several several.. Hence, even if there is non impleadment of one of the torffeasors, the claimant was entitled to full compensation quantified by the E Tribunal.The Full Bench referred to the decision of a Division bench of the Gujarat High Court in Hiraben Bhaga V. Gujarat SRTC in which it has been laid down that it is entirely the choice of the claimant whether to implead both both the joint tortfeasors or either of them.On failure of the claimant to impiead one of the joint tortfeasors, contributory liability cannot be fastened upon the claimant to the extent of the negligence of non impleaded joint tortfeasors.It is for the joint torfeasors nade liable to pay compensation to take proceedings to settle the equities as against other joint tortfeasors who had not been impleaded.It is open to the impleaded joint tortfeasor to sue the other wrongdoer after the decree or award is given to realise to the

extent of others ' liability.It has been laid down that the law in Ganesh case has been rightly laid down and it is not necessary to implead all joint tortfeasors and due to failure of impleadment of all joint tortfeasors, compensation cannot be reduced to the extent of negligence of non-impleaded tortfeasors. Non-impleadment of one of the joint tortfeasors is not a defence to reduce the compensation payable to the claimant.In our opinion, the law appears to have been correctly stated in Karnataka SRTC V. Arun.

12. A Full Bench of the Madhya Pradesh High Court in Sushila Bhadoriya v. M.F. SRTC has also laid down that in case of composite negligence the, liability is joint and several and it is open to MERE imposed the driver, owner and the insurer of one of the vehicles to recover the whole amount from one of the joint tortfeasors. As to apportionment also, it has been observed that both the vehicles will be jointly and severally liable to pay the compensation. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two as it is difficult to determine the apportionment in the absence of the drivers of both the vehicles appearing in the witness box. Therefore, there cannot be apportionment of the claim between the joint tortfeasors.

13. The relevant portion of the decision of Full Bench is extracted hereunder:(SCC OnLine Mp paras 25-28)

" 25. When injury is caused as a result of negligence of two joint tortfeasors,

26. On the same principle, in the case Exten of joint tortfeasors where the liability is joint and several, it is the choice of the claimant to claim damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There cannot be apportionment of claim of each tortfeasor in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.

27. To sum up, we hold as under

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue the owner, driver and insurer of both the vehicles. The claimant may implead the owner, driver and insurer owner of both the vehicles or any one of them.

(ii) There cannot be apportionment of the liability of joint tortfeasors. In case both the joint tortfeasors are impleaded as Party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principle of law, there is no necessity to apportion the inter se liability of joint tortfeasors.

28. Reference is answered accordingly. The appeal be placed before the appropriate Bench for hearing ".

15. In view of the above decision of the Hon'ble Apex Court, the Tribunal is justified in holding that the respondents before the Tribunal are jointly and severally liable to pay the entire compensation amount to the claimant and then they are at liberty to recover 65% from the owner or insurer of the unknown lorry. I do not find any error in the impugned Judgment and Award passed by the Tribunal in SO far as the ability of the appellant/Insurance Company, wherein the Tribunal directed the appellant/Insurance Company to deposit the entire compensation amount with interest accrued thereon. Accordingly, I pass the following:

ORDER

The appeal is dismissed.

The amount in deposit before this Court shall be transmitted to the Tribunal.