THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.No.2463 of 2012

JUDGMENT:

Aggrieved by the Award dated 17.04.2012 in M.V.O.P.No.522 of 2008 passed by the Chairman, MACT-cum-Principal District Judge, Kadapa (for short "the Tribunal"), the 2nd respondent in the O.P/ United India Insurance Company Limited preferred the instant appeal.

2) The factual matrix of the case is thus:

a. The first claimant is the father, second claimant is the mother and third claimant is the brother of deceased—Boosam Hari Krishna. Their case is that on 30.07.2006 at about 7:00pm, the deceased along with his brother and two others while travelling in the tractor-cum-trailor bearing No.AP 04 C 758 and AP 04 C 759 was holding the articles of his owner—Murali Mohan to shift them to Om Santhi Nagar and on the way at Koti Reddy Circle, the driver of the said vehicle drove in rash and negligent manner, due to which the deceased fell down from the vehicle and it ran over him and caused instantaneous death of deceased. It is averred that the accident was occurred due to the fault of driver of offending tractor-cum-trailor. On this pleas, the claimants filed M.V.O.P.No.522 of 2008 under Section 166 of Motor Vehicles Act, 1988 (for short "M.V.Act") and claimed Rs.4,50,000/- as compensation against respondents 1 and 2 who are owner and insurer of offending vehicle.

b. R.1 filed his counter and admitted about the accident and claimed that the vehicle had valid insurance coverage and the driver had valid driving licence. R.1 further claimed that after the accident, the claimants received Rs.90,000/- from R.1 and the owner i.e, V.Murali Mohan towards full and final settlement, thus the petition is not maintainable. Finally R.1 contended that the compensation claimed is excessive and prayed to dismiss the O.P.

c. R.2/Insurance Company filed counter and denied the material averments made in the petition and urged to put the claimants in strict proof of the same. R.2 contended that the deceased travelled as a passenger in the trailor in violation of terms and conditions of policy and so R.2 is not liable for claim. Finally R.2 contended that the compensation claimed is excessive and exorbitant and thus prayed to dismiss the O.P.

d. During trial, PWs.1 to 3 were examined and Exs.A1 to A5 were marked. RWs.1 and 2 were examined and Exs.B1 and B2 were marked on behalf of respondents.

e. The Tribunal, on appreciation of both oral and documentary evidence, had awarded Rs.1,90,000/- as compensation against respondents with proportionate costs and interest @ 6% p.a. under different heads as below:

Loss of dependency Rs. 1,80,000-00

Loss of love and affection Rs. 5,000-00

Funeral and other expenses Rs. 5,000-00

Total: Rs.1,90,000-00

Hence, the appeal by Insurance Company.

3) The parties in this appeal are referred as they were arrayed before

the lower Tribunal.

4) Heard arguments of Smt.A.Jayanthi, learned counsel for appellant/ Insurance Company and Sri M.Jayaram Reddy, learned counsel for respondent No.2/claimant. Notice sent to R.1 was not yet returned and notice sent to R.3 was unserved. Though notice to R.4 was served but there is no representation on his behalf, hence treated as heard.

5 a) Fulminating the award imposing liability on Insurance Company, learned counsel for appellant sought to repudiate the liability on the contention that the deceased travelled in the crime tractor-cum-trailor as an unauthorized passenger whose risk is not covered under the terms of policy. Hence, on this ground Insurance Company cannot be held responsible to pay compensation.

b) Nextly, she argued that the Tribunal erred in fastening the liability on the Insurance Company inasmuch as the crime vehicle i.e, tractor-cum-trailor was meant for using agricultural purpose only but violating the terms of policy, the vehicle was used for commercial purpose i.e, the insured hired his vehicle to PW.3—Murali Mohan for shifting his household articles (Saaman) and in view of manifest violation of the terms of policy, Insurance Company is not liable. Learned counsel further argued, even if the insured lent his vehicle to PW.3 free of cost due to friendship as contended, still the Insurance Company will not attain any liability for the reason that vehicle was used for a different purpose than agriculture.

She submitted that the Tribunal without considering the aforesaid aspects erroneously fastened liability on the Insurance Company.

c) Nextly, challenging the quantum of compensation, learned counsel argued that admittedly the claimants received Rs.90,000/- from R.1 and PW.3 in full and final settlement of the compensation and therefore, the Tribunal ought to have dismissed the claim or atleast deducted the amount earlier received by the claimants from the compensation awarded.

Learned counsel thus prayed to allow the appeal and exonerate the Insurance Company from its liability.

6) Per contra, while supporting the award learned counsel for R.2/claimant argued that the vehicle was not used for commercial purpose as the insured lent his vehicle free of cost to PW.3 and hence there was no violation of the terms of policy. He further argued that the amount of Rs.90,000/- was paid by PW.3 and R.1 as *ex gratia* and therefore, there was no need to deduct the said amount from the compensation and the Tribunal rightly negatived the contention of Insurance Company in that regard. He thus prayed to dismiss the appeal.

7) In the light of above rival arguments, the point for determination in this appeal is:

"Whether the award passed by the Tribunal is factually and legally sustainable?"

8) **<u>POINT</u>**: The accident, involvement of tractor-cum-trailor bearing No.AP 04 C 758 and AP 04 C 759 and death of deceased are admitted facts. The first ground on which Insurance Company repudiates its liability is that the deceased was an unauthorized passenger with reference to the crime vehicle. On a careful perusal of the record, particularly Ex.A.1—FIR and the evidence of PW.2, the said contention cannot be countenanced. As per FIR, the deceased, PW.2 and others were returning home after unloading the household articles of their owner i.e, PW.3 and on the way while negotiating the curve, the driver of the tractor drove the vehicle at high speed and in a rash and negligent manner and thereby, the deceased fell down from the vehicle and left rear wheel of the trailor ran over his head causing his instantaneous death. PW.2 reiterated the same facts in his evidence. From the aforesaid evidence which is unrebutted, it is clear that the deceased met with accident after he was totally disembarked from the vehicle but not while he was in the vehicle. Hence, it can be said that he met with accident as a third party but not as a gratuitous or unauthorized passenger in the vehicle at the time

of accident. My view gets fortified from the decision of this Court reported in ***United India Insurance Company Limited rep. by its Branch Manager vs. Kurva Yejju Mallamma and others***. In that case also when the deceased was alighting from the lorry, the driver moved the vehicle rashly and thereby the deceased fell down, suffered injuries and died. In the resultant claim petition, the Insurance Company sought to repudiate its liability contending that the deceased was a gratuitous passenger and policy would not cover his liability. However, a learned Single Judge of this Court following the decisions reported in:

1. ***A. Subramani vs. Mani and others***
2. ***Kanwar Shamsher Singh and others vs. Satbir Singh and others***
3. ***Thoznilalar Transport Company vs. Valliammal and others***
4. ***Oriental Insurance Co. Ltd. and another vs. Edward D'Cruz and others***

has held that the deceased was a third party at the point of accident he fell down from the vehicle. Applying the above ratio to the present case, the deceased can be held as a third party but not as a gratuitous passenger. Unfortunately this legal aspect was not raised before the lower Tribunal and hence it did not consider the same. Ex.B.2—policy shows that it covers the risk of the deceased as a third party. Hence, the contention of appellant cannot be accepted.

9) The next contention is that the policy was issued for using the vehicle for agricultural and forestry purposes but contrary to the terms, the vehicle was used for commercial purpose i.e, for transportation of the goods of PW.3 and in view of the violation of terms of the policy, the Insurance Company is not liable. This argument is untenable for the reason that as per Ex.A.1—FIR and the evidence of PW.2, the vehicle was empty and not transporting any goods at the relevant time of accident. The household articles of PW.3 were already shifted from Y.V.Street to Om Shanthi Nagar and

when the tractor-cum-trailor was returning with the deceased and others, the accident took place. So strictly speaking, the accident cannot be said to have taken place when the vehicle was used for transportation of the household articles. Hence, the violation pleaded cannot be accepted.

10) The next contention is with regard to the quantum of compensation. A perusal of Ex.B.1—agreement shows that PW.3 and R.1 paid a sum of Rs.90,000/- to the claimants. From the fact that though PW.3 is not the owner of the crime vehicle but still he contributed some amount out of Rs.90,000/- which indicates that the amount was paid as *ex gratia*. Therefore, Ex.B.1 cannot prevent the claimants from filing the claim petition for just compensation. However, since the amount of Rs.90,000/- was paid in connection with the accidental death of deceased and not for any other reason, the said amount can be given off against the compensation awarded. The claimants derived the pecuniary benefit directly on account of accidental death of deceased. But for the accidental death of deceased, the said amount would not have been paid. Hence the amount of Rs.90,000/- can be correlated to the accidental death. Hon'ble Apex Court held that when the LRs of the deceased derived a pecuniary benefit directly due to the accidental death of deceased in a motor vehicle accident, the said amount can be deducted from the compensation awarded. It further held, however, if the pecuniary benefit has no nexus with the accidental death and amount would have accrued to the LRs even otherwise, then such a pecuniary benefit cannot be deducted from the compensation awarded. In ***Mrs.Helen C.Rebello and others vs. Maharashtra State Road Transport Corporation and another*** the Apex Court was dealing with the point as to whether the LIC money of the deceased received by his LRs. was to be deducted from compensation receivable under M.V Act or not. In that context, it held thus:

> *" xx xx Thus, under the present Act whatever pecuniary advantage is received by the claimant, from whatever source, would only*

mean which comes to the claimant on account of the accidental death and not other form of death….." (Para—36)

" xx xx The insured (deceased) contributes his own money for which he receives the amount has no co-relation to the compensation computed as against tortfeasor for his negligence on account of accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act, he receives without any contribution. As we have said the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual." (Para—39)

In ***United India Insurance Co. Ltd., v. Patricia Jean Mahajan and ors.*** Apex Court again held in the same lines.

a) When the above ratio is applied to the instant case, there was direct nexus between the pecuniary advantage received by the claimants and the accidental death of deceased in the motor vehicle Accident. Hence, the amount of Rs.90,000/- has to be deducted from the total compensation and the respondents are liable to pay the balance amount only.

11) In the result, this M.A.C.M.A filed by the Insurance Company is partly allowed and ordered as follows:

a. While upholding the quantum of compensation of Rs.1,90,000/- awarded by the Tribunal, the respondents in the O.P are held jointly and severally liable to pay only Rs.1,00,000/- (Rs.1,90,000/- minus Rs.90,000/-) to the claimants with proportionate costs and interest @ 6% p.a from the date of O.P till the date of realisation.

b. The respondents in the O.P are directed to deposit the compensation amount within two (2) months from the date of this judgment, failing which execution can be taken out against them.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 04.12.2015

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