THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.No.1115 of 2010

JUDGMENT:

Aggrieved by the Award dated 03.10.2009 in M.V.O.P.No.664 of 2008 passed by the Chairman, MACT-cum-Principal District Judge, Kadapa (for short "the Tribunal"), the 2nd respondent in the OP/ Bajaj Allianze General Insurance Company Limited preferred the instant appeal.

2) The factual matrix of the case is thus:

a. The case of the claimant is that on 26.05.2007 at about 4 AM, when he was travelling in a lorry bearing No.AP 22V 5531 from Mukhal, Mahabubnagar District along with his pigs and when it reached Kalugutla bus stop, Nandyal, Koilkuntla main road, the driver of the lorry drove the same in a rash and negligent manner and at high speed and dashed behind a stationed lorry. Thereby, the claimant suffered fracture injuries all over the body. Immediately he was shifted to Government General Hospital, Kurnool where he took treatment as inpatient for 10 days and thereafter he undertook treatment from a private Orthopedic Surgeon at Kadapa. It is averred that the accident was occurred due to the fault of driver of the offending lorry. On these pleas, the claimants filed M.V.O.P.No.664 of 2008 under Section 166 of Motor Vehicles Act, 1988 (for short "M.V.Act") and claimed Rs.1,00,000/- as compensation against respondents 1 and 2 who are owner and insurer of offending lorry.

b. R1 remained *exparte*.

c. Respondent No.2/Insurance Company filed counter denying all the material averments made in the petition and contended that driver of lorry had no valid and effective licence at the time of accident and the owner knowingly handed over the vehicle to him. R2 also contended that claimant travelled in the lorry as an unauthorized passenger in violation of terms of the policy and therefore, R2 is not liable to answer the claim. R2 further contended that compensation claimed is highly excessive and exorbitant and thus prayed to dismiss the O.P.

d. During trial, PWs.1 and 2 were examined and Exs.A1 to A4 were marked on behalf of claimant. RW1 was examined and Exs.B1 to B3 were marked on behalf of respondents.

e. The Tribunal considering the oral and documentary evidence held that driver of the lorry was responsible for the accident and awarded Rs.92,200/- with proportionate costs and interest at 6% p.a. under different heads as follows:

Pain and suffering Rs. 22,000-00

Medical expenses Rs. 4,000-00

Extra-nourishment Rs. 2,000-00

Transport charges Rs. 3,000-00

Partial permanent disability Rs. 61,200-00

Total: Rs. 92,200-00

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 Sri T.Mahender Rao, learned counsel for

appellant/Insurance Company, Sri J.Seshagiri Rao for R1/claimant. Notice sent to R2 was not returned.

5) Challenging the award, learned counsel for appellant/Insurance Company vehemently argued that the lower Tribunal grossly erred in ordering the Insurance Company to pay compensation and recover in spite of observing that the claimant travelled in the vehicle only as an unauthorized passenger. Expatiating it, he submitted when the claimant is an unauthorized passenger his risk under Ex.B1 policy would not cover, as under law, the owner of the vehicle is not under obligation to pay premium for the gratuitous/unauthorized passengers in a goods vehicle. In fact under Ex.B1 policy, no premium was paid for the gratuitous/unauthorized passenger but the Tribunal failed to consider Ex.B1 in proper perspective. Therefore the award may be set aside and Insurance Company may be exonerated from the liability. He cited the following decisions to buttress his argument that the policy will not cover the liability of an unauthorized passenger and insurance company is not liable therefor.

1. ***National Insurance Co. Ltd., vs. Cholleti Bharatamma and others.***
2. ***National Insurance Co. Ltd., vs. Rattani and others***
3. ***New India Assurance Co. Ltd., vs. Vedwati and others***
4. ***ThokchomOngbiSangeeta and another vs. Oriental Insurance Co. Ltd., and others***

a) Nextly, he argued that the driver of the offending lorry had no valid driving licence and the insured had knowingly allowed him to drive the vehicle and thereby committed breach of the terms of the policy and on this ground also the insurance company has to be exonerated from its liability but the lower Tribunal erroneously held that the driver had valid driving licence. In this context he relied upon the decision reported in ***New India Assurance Company Limited, Tirupati vs. G.Sampoorna and others***

b) Finally, he argued that there is no cogent evidence that the claimant suffered disability. PW3 who issued Ex.A.4 disability certificate, had in fact, not treated the claimant and therefore Ex.A4 cannot be taken into consideration. Without considering these aspects the Tribunal erroneously awarded Rs.61,200/- for the loss of earning power due to the alleged disability. He thus prayed to allow the appeal and exonerate the insurance company from its liability.

6a) Per contra, while supporting the award, learned counsel for respondent/claimant firstly argued that the claimant was not an unauthorized or gratuitous passenger in the crime lorry, but he travelled in the capacity of the owner of the goods inasmuch as he loaded the pigs purchased by him in the local shandy at Mukthal and carrying them to his native place Jammalamadugu in Kadapa district and met with accident on the way. In Ex.A1—FIR which was lodged within short time after accident, the claimant has clearly mentioned this fact and hence it is preposterous to contend that the claimant was only an unauthorized passenger. He argued that the risk of owner of the goods or his authorized representative shall be covered under Section 147 of M.V.Act and as Ex.B1—policy was in force by the time of accident, the risk of the claimant shall be deemed covered under Ex.B1.

b) Secondly, he contended that, as per Ex.B3 the driver of the crime lorry had valid driving licence which was so held by the Tribunal and hence the insurance company cannot harp on this issue.

c) Nextly, he argued that the claimant suffered fracture to his left leg which resulted in disability and PW2 who issued disability certificate though not treated him still a qualified Orthopaedic Surgeon and he on clinical and radiological tests certified disability at 25%. The lower Tribunal accepted his evidence but restricted the functional disability to 10% and accordingly awarded compensation which is just and reasonable and hence the same need not be reconsidered. 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) **POINT:** Accident, involvement of the lorry bearing No.AP 22 V 5531 and injuries to the claimant are not in dispute. As can be seen, the main ground on which the Insurance Company disowned its liability is that the claimant travelled in the vehicle as an unauthorized passenger whose liability is not covered under Ex.B1 policy. The Tribunal having designated him as an unauthorized passenger erroneously fastened liability on the insurance company and ordered to pay and recover compensation.

a) In this context, on perusal of oral and documentary evidence, I am constrained to observe that the Tribunal erred in its finding that the claimant was an unauthorized passenger. The contention of the Insurance Company before the Trial Court and the observation of the Trial Court to that effect are quite erroneous. Since inception, it is the case of the claimant that he has been doing business in pigs by purchasing them and rearing and selling away in different places and in that context, on 26.05.2007 he went to Mukthal village in Mahaboob Nagar District, purchased the pigs and loaded in the crime lorry bearing No. AP 22 V 5531 in order to go to his village and on the way, his lorry met with accident when it dashed against a stationed lorry. So, he pleaded that he travelled in the crime lorry as owner of the livestock, but not as gratuitous or unauthorized passenger. Be that it may, in Ex.A1 FIR which was recorded in the hospital on the same day of accident it was clearly mentioned that the claimant loaded pigs at Mukthal in the crime lorry to carry them to his native place Jammalamadugu and met with accident. Ex.A1 being recorded and lodged on the same day of accident, the truth of the facts contained therein can be believed. Thus the FIR manifestly shows that the claimant was not an unauthorized passenger. That being so, Ex.B1—policy being a commercial vehicle package policy, shall be deemed to cover the risk of owner of the goods. A faint argument was advanced as if no premium was paid under Ex.B1 to extend coverage to the risk of the owner of the goods but this argument cannot be accepted for the reason that under Sec.147 of M.V.Act, the liability of insurance company is absolute in respect of the owner or his authorized agent in a goods vehicle. Unfortunately the lower Tribunal did not consider Ex.A1 F.I.R to know the purpose of claimant in travelling in the crime lorry. So, the insured and insurer are jointly and severally liable to pay compensation and the direction of the lower Tribunal that Insurance Company shall pay and recover the compensation cannot be accepted. The cited decisions can be distinguished. In those decisions, the principle laid was that the risk of a gratuitous/unauthorized passenger in a goods vehicle will not be covered as the owner of the vehicle has no statutory responsibility to insure for such passengers. However, the facts in this case are that the claimant was the owner of the goods.

b) The next contention is that, the driver had no valid driving licence. This argument does not carry any conviction in the light of Ex.B.3 driving licence showing that the driver possessed valid driving licence to drive Heavy Goods Vehicle (HGV) for the period 30.08.1986 to 25.08.2009. Whereas the accident was occurred on 26.05.2007 indicating that he possessed valid driving licence by that date. Consequently the cited decision in the case of ***G.Sampoorna*** (5 supra) will not help the cause of the appellant.

c) Then the next contention of the appellant is that the Tribunal erred in awarding compensation for the alleged disability and loss of earning capacity. As far as injuries are concerned, Ex.A.2 wound certificate issued by Government Hospital, Nandyal would show that the claimant suffered fracture shaft of left tibia besides two simple injuries. He underwent treatment in Government Hospital, Nandyal and thereafter in Government General Hospital, Kurnool. Admittedly PW2 has not treated him, but issued Ex.A4 disability certificate. His evidence is that he examined the claimant on 21.04.2009 and found a deformity in the left leg as tenderness was present in his left leg due to which the claimant was experiencing moderate pain and there was also weakness in the muscles of the left leg. Further the X-ray revealed shortening of the left leg by 1 inch. Due to all these, the claimant was limping and the movement of his left knee was partially restricted. Basing on these findings, PW2 certified that the claimant suffered 25% physical disability. The Tribunal though accepted this evidence, restricted the corresponding functional disability to 10% and accordingly awarded compensation. Though it is true that PW2 was not the doctor who treated the claimant, he is a qualified Orthopaedic Surgeon who on clinical and radiological examination certified his physical disability. The qualification of the doctor was not challenged in the cross examination made by the insurance company. In the case of ***Raj Kumar vs. Ajay Kumar*** it was held that a qualified doctor can issue the disability certificate, but of course the same can be challenged by the Insurance Company. In this case, as already stated, the qualification of the doctor was not challenged and the Insurance Company did not request the lower Tribunal to refer him to other qualified doctor or Medical Board in support of its contention that the claimant did not suffer any disability. Therefore the lower Tribunal was right in accepting the evidence of PW2. Compensation awarded for disability was also just and reasonable. So at the outset, none of the grounds raised by the appellant are tenable.

9) In the result, this MACMA filed by the Insurance Company is dismissed and the award of the lower Tribunal is modified and ordered as follows:

> a) The compensation awarded by the lower Tribunal is upheld and Respondents 1 and 2 in the O.P are held to be jointly and severally liable to pay compensation. They are directed to deposit the compensation amount within 2 months from the date of this judgment, failing which execution proceedings can be taken out against them.
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> b) No costs in this appeal.

U. DURGA PRASAD RAO, J

Date: 30.11.2015

Murthy