THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

M.A.C.M.A.No.2463 OF 2014

JUDGMENT:

This appeal is preferred under Section 173 of the Motor Vehicles Act, 1988 (the Act), challenging the judgment and award dated 07.1.2014 passed in M.V.O.P.No.700 of 2010 on the file of the Chairman, Motor Vehicle Accident Claims Tribunal-cum-I Additional District Judge, Kurnool, wherein and whereby the Tribunal allowed the petition in part by awarding compensation of Rs.1,00,000/- as against the claim of Rs.3,00,000/-.

2. The parties to this appeal will hereinafter be referred to as they are arrayed before the Tribunal, to avoid confusion.

3. The facts leading to filing of the appeal are briefly as follows: On 04.7.2009, Boya Nagesh and Boya Narsimhulu were proceeding to their village from Adoni in an auto bearing No.AP 21Y 8411. When they reached Parrai Gutta, the driver of the auto had driven the same in a rash and negligent manner and lost control over the auto, thereby the auto turned turtle. Boya Nagesh (hereinafter referred to as, the deceased) died on the spot, due to the injuries sustained in the accident. The accident was occurred due to the rash and negligent driving of the driver of the auto bearing No.AP 21Y 8411 (crime vehicle) against whom the Station House Officer, Pattikonda Police Station registered a case in Crime No.160 of 2009 under Sections 337 and 304A IPC. By the time of the accident, the deceased was aged about 21 years and used to earn Rs.3,000/- per month. The petitioners, who are the parents of the deceased, are dependants on the income of the deceased. The crime vehicle, which belongs to the first respondent, was insured with the second respondent with effect from 02.5.2009 to 01.5.2010; therefore, the respondent Nos.1 and 2 are jointly and severally liable to pay compensation to the petitioners. Hence, the petition claiming compensation of Rs.3,00,000/- from the respondent Nos.1 and 2 jointly and severally with interest and costs.

4. The first respondent died. The second respondent filed written statement denying all the averments made in the petition including the manner of the accident, age and income of the deceased. Admittedly the first respondent died; therefore, the claim

against a dead person is not maintainable. The deceased is the owner of the auto bearing No.AP 21Y 8411, which belongs to the deceased, was insured with this respondent with effect from 02.5.2009 to 01.5.2010. As per the provisions of the Motor Vehicles Act, the policy issued by this respondent does not cover the risk of the owner of the vehicle. The deceased was not having valid and effective driving licence at the time of the accident; therefore, the deceased cannot be termed as a driver or co-driver. Hence, the petition may be dismissed.

5. Basing on the above pleadings, the Tribunal framed the following issues:

> 1. Whether the accident took place as stated in the petition?
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> 2. Whether the petitioners are entitled to compensation? If so, to what amount and from which of the respondents?
>
> 3. To what relief?

6. During the course of trial, on behalf of the petitioners, P.Ws.1 to 3 were examined and Exs.A1 to A4 were marked. On behalf of the second respondent, R.W.1 was examined and Ex.B1 was marked.

7. Basing on the oral, documentary evidence and other material available on record, the Tribunal arrived at a conclusion that the accident was occurred due to the rash and negligent driving of the driver of the crime vehicle, which resulted in the death of the deceased and allowed the petition in part by awarding a compensation of Rs.1,00,000/- with interest at 9% per annum from the date of the petition till realization directing the second respondent to pay the compensation. Feeling aggrieved by the judgment and award of the Tribunal, the second respondent–Insurance company preferred the present appeal.

8. The contention of the learned counsel for the second respondent is three fold:

(1) the petitioners are not entitled to claim compensation for the death of the deceased in a road accident, who is owner of the crime vehicle, in view of provisions of the M.V. Act;

(2) the Tribunal failed to consider that Ex.B1 policy does not cover the risk of the owner of vehicle as the deceased has not paid premium; and

(3) the petition against a dead person is not maintainable.

Per contra, the learned counsel for the claimants submitted that the Tribunal by placing reliance on Section IV of Ex.B1 policy rightly awarded compensation. He further submitted that there are no grounds much less valid grounds to interfere with the judgment and award of the Tribunal.

9. Basing on the rival contentions, the point that arises for consideration in this appeal is:

> Whether the Tribunal has committed any error while fastening the liability on the second respondent?

<u>Point</u>:

10. There is no much dispute between the parties with regard to the manner of the accident and the factum of death of the deceased in the motor vehicle accident that occurred on 05.11.2009. As per the averments made in the petition, Boya Nagesh is the owner of the Auto bearing No.AP 21Y 8411. In the cross-examination, R.W.1 in unequivocal terms deposed that by the time of the accident, the deceased was travelling in the auto. The testimony of R.W.1 clearly reveals that the crime vehicle was insured with the second respondent under Ex.B1 policy. The Tribunal allowed the petition basing on Section IV (Personal Accident Cover for owner-cum-driver) contained in Ex.B1 policy. It is not out of place to extract hereunder the relevant portion from Ex.B1 policy.

"Subject otherwise to the terms, exceptions, conditions and limitations of this policy, the Company undertakes to pay compensation as per the following scale for bodily injury/death sustained by the owner-driver of the vehicle, in direct condition with the vehicle insured or whilst driving or mounting into/dismounting from or travelling in the **insured vehicle as a co-driver**, caused by violent, accidental, external and visible means which independent of any other cause shall within six calendar months of such injury result in:-

	Nature of Injury	**Scale of compensation**
(i)	Death	100%
(ii)	Loss of two limbs or sight of two eyes or one limb and sight of one eye	100%
(iii)	Loss of one limb or sight of one eye	50%
(iv)	Permanent total disability from injuries other than names above	100%

Provided always that

1) the compensation shall be payable under only one of the items (i) to (iv) above in respect of the owner-driver arising out of any on occurrence and the total liability of the insurer shall not in the aggregate exceed the sum of Rs.1 lakh during any one period of insurance.

2) ………”

11. A perusal of the above Section clearly demonstrates that if the owner of the vehicle died, while driving the vehicle at the time of the accident, the legal representatives of the deceased-owner are entitled to claim compensation amount of Rs.1,00,000/-. In the case on hand, the petitioners are entitled to claim for compensation if at all they establish that the deceased-Boya Nagesh had driven the crime vehicle or he was travelling therein as a co-driver at the time of the accident.

12. There is no pleading in the petition to the effect that by the time of the accident, the deceased was driving the auto or travelling in the auto as a co-driver. P.W.1 is none other than the father of the deceased. As per the testimony of P.W.1, by the time of the accident, himself, his son (deceased) and others were travelling in the auto. There is no whisper in the testimony of P.W.1 that by the time of the accident, the deceased had driven the crime vehicle or travelled therein as a co-driver so as to mulct the liability on the second respondent. P.W.3, in unequivocal terms, deposed that one M.Ranganna had driven the auto at the time of the accident. Basing on the testimony of P.Ws.1 and 3 coupled with recitals of Ex.A1 (F.I.R.) and Ex.A2 (charge sheet), the irresistible conclusion that can be drawn is that by the time of the accident, the deceased was travelling in the crime vehicle as a passenger and not as a driver or a co-driver.

13. The Tribunal proceeded on a premise as if Section IV of Ex.B1 policy covers the risk of the owner of the vehicle even if he travels in the vehicle as a passenger. A perusal of Section IV of Ex.B1 clearly demonstrates that the insurance policy covers the risk of owner of the vehicle if he had driven the vehicle or travelled therein as co-driver at the time of unfortunate accident. If the above conditions are fulfilled, then the legal representatives of the deceased (owner of the vehicle) are entitled to file claim petition under Section 166 of the Act. Admittedly, the deceased is one of the parties to Ex.B1 policy. By any stretch of imagination, it cannot be presumed that the deceased is a third party as postulated under the provisions of the Act. A perusal of

Ex.B1 reveals that the deceased has not paid extra premium towards compulsory personal accident covering the risk of the owner-cum-driver. Section 147 of the Act does not mandate that every policy issued by the insurer shall cover the risk of owner-cum-driver of the vehicle. On the other hand, Section 147 of the Act mandates that every policy issued by the insurer shall cover the risk of third parties.

14. Suffice it to say, that the liability of the insurer is either statutory or contractual. If the case falls within the purview of Section 147 of the Act, the liability of the insurer is statutory in nature. If the case falls outside the purview of Section 147 of the Act, there should be a contract between the insured and insurer covering the risk of particular person by paying extra premium. A perusal of Ex.B1 policy, at a glance, demonstrates that the deceased has not paid extra premium covering the risk of owner-cum-driver. Payment of extra premium is *sine qua non* to claim compensation by the legal representatives of the deceased (owner-cum-driver) under Section 166 of the Motor Vehicles Act. A perusal of the terms and conditions of Ex.B1 policy clearly demonstrates that covering of risk of owner-cum-driver of the vehicle is only contractual obligation. Section IV of Ex.B1 policy starts with the word "*Subject otherwise to terms, exceptions, conditions and limitations of this policy,*". This clearly indicates that the legal representatives of the deceased (owner of the vehicle) can take aid of Section IV of Ex.B1 provided there is a contract between the insured and the insurer. To put it in a different way, Section IV of Ex.B1 policy enables the petitioners to claim compensation subject to payment of the extra premium covering the risk of owner-cum-driver. Admittedly, no extra premium is paid covering the risk of owner-cum-driver. The Tribunal, by losing sight of this vital aspect, proceeded on a wrong premise that the petitioners are entitled to compensation by taking shelter under Section IV of Ex.B1, even without paying extra premium. There is no observation in the award of the Tribunal that the claimants are entitled to compensation under Section IV in view of payment of extra premium covering the risk of owner-cum-driver. Basing on the material available on record, the court can safely arrive at a conclusion that there is no statutory or contractual obligation on the part of the insurer to pay compensation to the claimants, who are none other than the parents of the owner of the auto in question.

15. A perusal of the cause title of the original petition, gives an impression to anybody that the first respondent (owner of the auto) was very much alive as on the date of filing of the petition. The case of the petitioners is that Boya Nagesh (owner

of the auto) died on the day of the accident itself i.e., on 05.11.2009 whereas the petition was filed before the Tribunal on 06.2.2010. Therefore, by the date of filing of the petition, the owner of the auto was no more. Further, the Tribunal ordered notice to the first respondent as if he was alive as on the date of filing of the petition. The notice sent to the first respondent was returned with an endorsement that the first respondent died. The fact remains that the first respondent died in the accident on 05.11.2009. This clearly indicates that a dead person was shown as first respondent. The claimants have filed the claim petition by suppressing the factum of death of the first respondent as on the date of filing of the petition.

16. It is a settled principle of law that no suit or proceeding is maintainable against a dead person. After the death of the deceased-Boya Nagesh (first respondent), second petitioner, who is mother of the deceased, as Class-I heir automatically becomes the owner of the auto bearing No.AP 21Y 8411. The second petitioner steps into the shoes of the owner of the auto by the time of filing of the petition. Surprisingly and interestingly, she along with her husband (first petitioner) is claiming compensation from the owner of the vehicle, who is no more by the time of filing of the petition. Suffice it to say, an insured cannot be a recipient of the claim. Viewed from this angle also, the claim petition cannot be maintained. The insured is vicariously liable for the wrongful acts committed by the driver in the course of his employment. The insurer has to indemnify the liability of the insured in view of the terms and conditions of insurance policy. In a given case, when the question of liability of the insured does not arise, the question of indemnifying the liability of the insured by the insurer does not arise at all. In order to claim compensation from the insurer, the petitioners filed the present petition by suppressing the material facts. At this juncture, learned counsel for the second respondent has drawn my attention to the decision of the Hon'ble apex Court in **Dhanraj v New India Assurance Co. Ltd.**. It is apposite to extract relevant paragraphs hereunder:

> 9. In the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi,* it has been held that the liability of an Insurance Company is only for the purpose of indemnifying the insured against liabilities incurred towards third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the Insurance Company has no liability also.
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> 10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs.4,989/- paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the

> words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. **An owner of a vehicle can only claim provided a personal accident insurance has been taken out.** In this case, there is no such insurance.

17. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the finding of the Tribunal fastening the liability on the second respondent, which is not sustainable either on facts or on law. There are grounds much less valid grounds to set aside the findings and award of the Tribunal. The award passed by the Tribunal is liable to be set aside. Accordingly, the point is answered against the claimants and in favour of the appellant-second respondent.

18. In the result, the appeal is allowed, setting aside the judgment and award dated 07.1.2014 passed in M.V.O.P.No.700 of 2010 on the file of the Chairman, Motor Vehicle Accident Claims Tribunal-cum-I Additional District Judge, Kurnool. M.V.O.P. No.700 of 2010 is dismissed without costs. Miscellaneous petitions, if any, pending in this appeal, shall stand closed.

T.SUNIL CHOWDARY, J

Date: 21.08.2015.

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