<u>HON'BLE SRI JUSTICE S.V. BHATT</u>

<u>M.A.C.M.A. No. 1483 OF 2005</u>

Date: 07-12-2015

Between:

Mannem Ramanamma
& others.

… Appellants

And

Smt. G. Manoharamma
& another.

… Respondents

<u>HON'BLE SRI JUSTICE S.V. BHATT</u>

M.A.C.M.A. No. 1483 OF 2005

JUDGMENT:

Heard Sri P. Sreedhar Reddy, learned counsel for the appellant, and Sri Naresh Byrapaneni, learned counsel for 2nd respondent.

Claimants in M.V.O.P.No.486 of 1998 in the Court of II Additional District Judge-cum-Motor Accidents Claims Tribunal, Nellore, are the appellants.

The appeal is for enhancement of compensation by Rs.45,000/- and to fix the joint and several liability on the owner of vehicle and the insurance company. The circumstances relevant for disposal of the appeal are as follows:

One Venkateswarlu was working as Watchman and Oil Engine Driver at engine shed in Modi Mineral Mine, Turimerla. On 03.08.1997, at 6.00 a.m., when Venkateswarlu was doing the watch and ward duty, the Tipper bearing No.AP 09 T 5004 driven in a rash and negligent manner lost control and dashed Venkateswarlu. Venkateswarlu received multiple injures and died on the spot. The claimants are his wife and children. The claimants aver that as watchman, Venkateswarlu was earning Rs.2,000/- per month and on account of Venkateswarlu's demise, the claimants have lost bread earner of the family and claimants are rendered helpless dependants. The motor accident of Tipper is registered as Crime No.83/97. The vehicle bearing No.AP 09 T 5004 is insured by the 2nd respondent. Therefore, the claimants pray for awarding a sum of Rs.2,25,000/- towards compensation for the loss of Venkateswarlu against 1st and 2nd respondents.

The 1st respondent filed counter admitting the ownership of vehicle bearing No.AP 09 T 5004. According to 1st respondent, the vehicle is covered by cover note No.519371, dated 25.02.1996, valid up to 24.03.1997 and admittedly insurance coverage of the vehicle is covered by Insurance Police No.51912/611402, which is valid up to the midnight of 24.04.1998 (Ex.B.1). At the outset, it is recorded that at the time of accident, the risk is covered by a valid policy. It is further averred in the counter of 1st respondent that the driver of Tipper drove the vehicle in a rash and negligent manner and caused the accident, which resulted in the death of Venkateswarlu. On the quantum, the 1st respondent contends that the compensation claimed is excessive.

The 2nd respondent/insurance company filed independent counter. The 2nd respondent admitted that the subject vehicle is insured with it and is covered by police issued under Ex.B1. The 2nd respondent disputed the liability to pay compensation by taking the plea that the driver of the Tipper was not having valid and effective driving licence and on account of not having valid and effective driving licence the 2nd respondent prayed for firstly dismiss the claim against insurance company and secondly the 2nd respondent contended that the compensation claimed is excessive.

The Tribunal framed the following issues for enquiry:

> "(1) Whether the pleaded accident occurred causing the death of the deceased and if so was it due to the fault of the lorry (tipper) bearing No.AP 09 T 5004 belonging to Respondent No.1?
>
> (2) Whether respondent No.1 insured his vehicle with second respondent/insurance company by the date of accident and if so, whether the policy covers the risk of the deceased?
>
> (3) Whether the petitioners are entitled to compensation and if so to what amount and from which of the respondents?
>
> (4) To what relief?"

On issue No.1, the finding of fact recorded by the Tribunal is that the accident is due to the rash and negligent driving of the Tipper by the driver at the time of accident. On issue No.2, it is held that at the time of accident, due to the existence of Ex.B1 there is a valid insurance coverage of the vehicle. On issue No.3, it is held that the 2nd respondent - insurance company is not liable to pay compensation to the claimants and it is only the 1st respondent, who has to pay compensation. On the quantum, the Tribunal held as follows:

> "In view of my foregoing discussion, I hold that the petitioners are entitled to the following compensation under different heads:-

a.	Loss of dependency	Rs.	1,60,000/-
b.	Loss of estate comprising loss of expectation of life, pain and suffering and loss of amenities of the petitioners.	Rs.	15,000/-
c.	Loss of consortium to the 1st petitioner	Rs.	5,000/-
		Rs.	1,80,000/-"

Hence, this appeal.

Learned counsel for the appellants contends that the dependency arrived at by the Tribunal is erroneous and illegal. According to him, the deceased was admittedly working as a watch and ward in Modi Mineral Mine, Turimerla. The activity is governed by Minimum Wages Act and G.O.Ms.No.76, dated 29.11.2000, has stipulated the minimum rates payable to a watchman. At any rate, the claim of Rs.2,000/- per month is neither on the higher side nor excessive. It is canvassed that the Tribunal committed an illegality by applying Schedule II of Section 163-A of the Motor Vehicles Act to the facts of the case when the claim is under Section 166 of the Act. Learned counsel contends that the claim of Rs.2,000/- per month towards salary ought to have been accepted and compensation determined by the Tribunal. On the findings recorded on issue No.3 the learned counsel contends that the 1st respondent being the owner did not state on the existence of a valid or effective driving licence to the driver. A plea is taken by the 2nd respondent on the existence of valid and effective driving licence to the Tipper driver. Therefore, the burden is on the 2nd respondent to prove that driver of the Tipper did not have a valid and/or effective driving licence at the time of accident. In the case on hand, according to him, Exs.A1 to A4 do not in any way support the case of the insurance company. 2nd respondent/insurance is liable to pay compensation and exoneration of 2nd respondent is unsustainable. He prays for awarding compensation on both the respondents and for enhancement of compensation by Rs.45,000/-. On the principle of burden he relies upon the decision reported in **United India Insurance Company Ltd., Kurnool V. Madiga Thappeta Ramakka and others**[1].

Learned counsel for the 2nd respondent contends that it has discharged the onus and the insurance company can certainly rely upon the contents in Exs.A1, A4 and A5 in support of its plea that the driver of the Tipper was not having a valid and effective driving licence. Learned counsel firstly tries to sustain the findings recorded by the Tribunal and alternatively contends that the compensation awarded by the Tribunal is just and proper and secondly that if this Court comes to any other conclusion on the liability of the insurance company, according to learned counsel, it ought to be with interest at 7.5% as determined in **Sarla Verma & others V. Delhi Transport Corporation and another**[2].

I have heard learned counsel appearing for the parties and perused the material available on record.

Now the following points arise for consideration:

1. Whether the claimants are entitled for a joint and several decree against respondent Nos.1 and 2 for the compensation? and

2. Whether the claimants are entitled for enhancement of Rs.45,000/- compensation?

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POINT No.I:

To avoid liability under Ex.B1 the case of 2nd respondent is that the driver of Tipper was not having valid and effective driving licence. Admittedly, the 2nd respondent, except marking Ex.B1, did not adduce any other documentary evidence. The Tribunal by reference to Exs.A1 to A5 has recorded a finding that the 2nd respondent has discharged the onus to prove that the driver of the vehicle did not have licence and the 1st respondent - owner had allowed the person, who had no licence, to drive the vehicle and there is breech on the part of the insured. Let me examine whether the finding of Tribunal on this aspect is tenable or not. Ex.A1 is the First Information Report (FIR). FIR was given by Ramanamma, wife of deceased. It can't be relied upon for determining whether the driver had licence or not.

I have perused Ex.A1 and from the details given in the FIR it cannot either way stated that whether the driver of vehicle was having either a valid or effective driving licence. Upon considering the details given in FIR, I am of the view that the FIR refers to an accident happened at about 9.00 a.m on 03.08.1997. From Ex.A1 it cannot be said that the 2nd respondent has discharged the initial burden cast on it. Ex.A2 is the inquest report. It refers to one Doraswamy Naidu as the driver of Tipper and the Tipper was driven in a rash and negligent manner. The name of the driver is ascertained through Ex.A2, but it does not say whether he had valid and effective driving licence. Ex.A4 is the report of Motor Vehicle Inspector, Gudur. Column 17 deals with name and address of the driver. The report of Motor Vehicle Inspector reads thus:

> "Driver particulars not furnished by S.H.O."

Ex.A5 is the charge sheet. The charge sheet refers to Doraswamy Naidu as driver of the Tipper and the driver was absconding from the date of accident. A combined reading of Exs.A4 and A5 would not discharge either the initial burden on the 2nd respondent much less the onus in any manner. This Court in **United India Insurance Company Ltd., Kurnool (supra)** dealing with a similar situation has considered the mode and manner of discharge of burden by the insurance company in the background of a similar plea to avoid liability. The relevant paragraphs in the reported decision read as follows:

> "6. The main thrust of the argument advanced by Sri S. Hanumaiah, learned counsel appearing for the appellants-Insurance company is that the 1st respondent is

not holding a valid driving licence as on the date of accident thereby the 2nd respondent-owner has violated, the conditions of the policy and so the 3rd respondent-insurance company is not liable to pay the compensation. To prove this contention, the burden heavily lies on the insurance company. We have to see whether the Insurance Company has discharged the burden cast upon it. In this connection, relying upon the decisions of the Supreme Court, Madhya Pradesh and Madras High Courts reported in *Narcinva V. Kamat v. Alfredo Antonio Deo Martins, and Karan Singh v. Manoharlal, 1989 ACJ 177 and New India Assurance Co. Ltd. v. C.B. Shankar, 1986 ACJ 82*, Sri C. Sadasiva Reddy, learned counsel appearing on behalf of the claimants in all the appeals vehemently contended that when the insurance company complains of a breach of the terms of contract, the burden is squarely on the insurance company to prove that the breach has been committed by the other party to the contract. According to the learned counsel Sri C. Sadasiva Reddy, the Insurance Company did not discharge the burden cast upon it and so it cannot disown its liability to pay the compensation.

7. In *Narcinva V. Kamat v. Alfredo Antonio Martins*, referred to above, while considering the burden of proof and liability of the insurance company, the Supreme Court observed as follows: ---

> "When the insurance company complains breach of the terms of contract, which would permit it to disown its liability under the contract of insurance, the burden is squarely on the insurance company to prove that the breach has been committed by the other party to the contract. The test in such a situation would be 'who would fail, if no such evidence is led'. With this principle of law in view the evidence has to be judged. Merely non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against the person holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by a mere question in cross-examination nor the owner is under any obligation to furnish the evidence so as to enable the insurance company not to riggle out its liability under the contract of insurance. However, the R.T.A., who issues the driving licence, keeps record of the licence issued and renewed by it and the insurance company could have got the evidence produced to substantiate its defence. Not only this, no enquiries were made by the insurance company from the R.T.A. concerned regarding the fact of issue of a driving licence to Manoharlal. Hence, it would not give rise to an adverse inference about respondent No.1 being an unauthorized driver."

Following the above judgment of the Supreme Court, the High Court of Madhya Pradesh, Indore Bench in *Karan Singh v. Manoharlal*, 1989 ACJ 177, referred to above, observed that as the driver was not examined and as the insurance company did not call any record of the R.T.A. or any other evidence to establish that the driver had no driving licence, the insurance company has failed to discharge its burden by leading legal evidence. In *New India Assurance Co. Ltd. v. C.B. Shankar*, 1986 ACJ 821 (supra), referred to above, it was observed by the Madras High Court that in order to escape the liability, the insurance company is not only required to prove that the driver was not holding licence at the time of accident but also to prove that the driver was disqualified from holding or obtaining a licence or never had any licence at all.

8. Mere mention in the criminal court's judgment about the driver not having a licence, much less a valid driving licence is not sufficient. It is well established legal principle that the findings given in criminal court judgments cannot be taken aid and cannot be taken advantage in civil matters. As seen from the above pronouncements of the Supreme Court and other High Courts, the best method is to summon the driver to produce the driving licence, and also to take appropriate steps to examine him. If the driver and the owner of the offending vehicle remain *ex parte*, a duty is cast upon the court on the application of the insurance company to take appropriate steps to summon the driver and examine him. If the driver is summoned and if he has

produced the driving licence it is sufficient. If he did not respond to the summons and did not appear nor did he produce the driving licence, an adverse inference can be drawn that he was not holding a valid driving licence. It is also the duty of the Insurance Company to summon the R.T.A. officials to produce the driving licence as the R.T.A. who issues the driving licence keeps record of the licence issued and renewed by it and the insurance company could have got the evidence produced to substantiate its defence. Either of the above two steps has not been taken by the insurance company. As already stated, if the driver, in spite of receipt of summons, has not been present and subjected himself for examination, the court is entitled to draw adverse inference. Whether a driver is having a valid driving licence or not is within the exclusive knowledge of the driver himself or at certain times the owner of the vehicle will be having that information as he is expected to know before he is taken as driver. The insurance company did not take any effective steps to discharge the burden. It is the case of the insurance company that one Adhinarayana Setty was appointed as investigating officer and he submitted his report Ex.B.6. Without examining the said Administrative Officer, his report, marked through another person, cannot be given due weight. The mere filing of the report of the Administrative Officer, without examining him, does not absolve the responsibility of the insurance company in discharging the burden. From the above discussion, I am of the opinion that the insurance company has not discharged its burden by leading legal evidence. Under the umbrella of Ex.B.1 policy it cannot take shelter and claim that it has discharged its burden cast upon it."

By juxtaposing the case on hand with the principle laid down by this Court in **United India Insurance Company Ltd., Kurnool (supra)** I am of the view that the findings recorded by the Tribunal on issue No.3 to exonerate the 2nd respondent are unsustainable and accordingly the findings are reversed. Consequently, the point is answered in favour of claimants that they are entitled to claim compensation from 1st and 2nd respondents.

POINT No.II.

The case of claimants is that the deceased was working as watchman in Modi Mineral Mine, Turimerla. The deceased was drawing Rs.2,000/- per month. The fact of deceased working in Modi Mineral Mine is admitted by the 1st respondent, who is the owner of the Tipper bearing No.AP 09 T 5004. The 2nd respondent did not dispute the status of deceased working as watch and ward in Modi Mineral Mine. The 2nd respondent alternatively pleaded that the compensation claimed by the claimants is excessive. The Tribunal considered the quantum in paragraphs 9 and 10 of the award under appeal. The Tribunal has relied upon Schedule II of Section 163-A of the Motor Vehicles Act and in the case on hand determination of compensation under Section 163-A of the Act is erroneous, for the claimants have failed to claim under Section 166 and proved the case with all ingredients. Even assuming that there is no independent proof of the salary drawn by the deceased, having regard to other admitted circumstances of the case, the Tribunal committed an error by ignoring to consider G.O.Ms.No.76, dated 29.11.2000. In my considered view, the claim of claimants at

Rs.2,000/- per month to a watchman in a mine is not on the higher side. The permissible deduction is Rs.500/- (Rs.2,000/- x 25/100 = Rs.500/-). The contribution of deceased to the family is determined at Rs.1,500/- per month and Rs.18,000/- per annum (Rs.1,500/- x 12 = Rs.18,000/-) and Rs.18,000/- x 16 multiplier works out to Rs.2,88,000/-. Therefore, the loss of dependency is determined at Rs.2,88,000/-. The Tribunal granted Rs.5,000/- towards loss of consortium to 1st claimant. Grant of consortium of Rs.5,000/- is incorrect and could be Rs.1,00,000/-. Thus, the re-determination of compensation is Rs.3,93,000/- (i.e., Rs.2,88,000/- towards loss of dependency + Rs.1,00,000/- towards consortium + Rs.5,000/- towards funeral expenses). The compensation claimed in the petition is Rs.2,25,000/-. Though the working of compensation comes to Rs.3,93,000/- having regard to the peculiar facts and circumstances of this case, the compensation is limited to the extent of claim made by the claimants i.e., Rs.2,25,000/- .

The appeal is allowed by determining the compensation payable to claimants as Rs.2,25,000/- by both the respondents with interest at 7.5% from the date of petition till the date of deposit. No order as to costs.

Miscellaneous petition, if any, shall stand closed.

S.V. BHATT, J

Date: 07.12.2015
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[1] 1995 ACJ 358

[2] 2009 (6) SCC 121