HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

M.A.C.M.A.No.213 of 2009

JUDGMENT:

Challenging the Award dated 24.10.2008 in O.P.No.1148 of 2004 passed by the IV Additional Metropolitan Sessions Judge-cum-XVIII Additional Chief Judge, Hyderabad (for short "the Tribunal"), the claimant preferred the instant appeal.

2) The factual matrix of the case is thus:

a. The case of the claimant is that on 06.01.2004 at about 12:00 noon, after loading wood while he was travelling in the lorry bearing No. MCU 4643 as coolie, the driver drove the lorry in a rash and negligent manner and applied sudden breaks. Due to which the claimant fell down from the lorry and the wheels of the lorry went on his left foot and it was crushed. Immediately, he was shifted to Gandhi Hospital, where his left foot was amputated. It is averred that the accident was occurred due to the rash and negligent driving by the driver of the offending lorry. On these pleas, the claimant filed O.P.No.1148 of 2004 under Section 166 of Motor Vehicles Act, 1988 (for short "MV Act") against respondents 1 and 2, who are the owner and insurer of the offending lorry and claimed Rs.4,00,000/- as compensation.

b. Respondent No.1 remained *ex parte*.

c. Respondent No.2/Insurance Company filed counter and denied the material averments made in the O.P and urged to put the claimant in strict proof of the same. R2 filed additional counter contending that the claimant travelled in the lorry which is a goods vehicle, as an unauthorized passenger and his risk is not covered under the terms of policy. R.2 thus prayed to dismiss the OP.

d. During trial, P.Ws.1 and 2 were examined and Exs.A1 to A6 were marked on behalf of claimant. RWs.1 and 2 were examined and Exs.B.1 to B.5 were marked on behalf of respondent.

e. A perusal of the Award would show that Tribunal basing on the evidence of PW.1—the claimant and PW.2—eyewitness held that the accident was occurred due to the negligent driving by the driver of the offending lorry.

f. Regarding issue No.2 which relates to quantum of compensation, the Tribunal awarded compensation of Rs.2,75,800/- with proportionate costs and interest at 7.5% p.a from the date of O.P till the date of realization under different heads as below:

For pain and suffering Rs. 10,000/-

For disability Rs.2,44,800/-

Transport charges Rs. 1,000/-

For medicines Rs. 15,000/-

For extra nourishment Rs. 5,000/-

Total Rs.2,75,800/-

Then liability is concerned, the Tribunal accepting the contention of second respondent/ Insurance Company that the claimant travelled in the lorry as an unauthorised passenger, exonerated the Insurance Company from liability and fastened the liability on the first respondent, who was the owner of the vehicle.

Hence, the appeal by claimant.

3) The parties in the appeal are referred as they stood in the Tribunal below.

4) Heard Sri P. Gangarami Reddy, learned counsel for appellant/ claimant and Sri R.K. Suri, learned counsel for respondent No.2/Insurance Company. R.1 is not necessary party to this appeal vide cause title.

5 a) Fulminating the award, insofar as exonerating the Insurance Company, learned counsel for appellant/Insurance Company argued that the evidence of PWs.1 and 2 would clearly show that claimant travelled in the crime lorry as a loading and unloading coolie but not an unauthorized passenger and as such his liability would squarely cover under Ex.B5—policy but the Tribunal on erroneous appreciation of evidence held as if the claimant is an unauthorized passenger and exonerated the Insurance Company.

Learned counsel alternatively submitted that even assuming that claimant travelled in the capacity of an unauthorized passenger, still his liability would be covered under Ex.B5—policy in view of the fact that after he fell down on the road, the lorry ran over on his left foot which implies that at the crucial moment of the accident he was on the road and not in the lorry and the lorry injured him in the capacity of third party and since policy covers the risk of third parties the Insurance Company is liable for his claim. On this aspect he relied upon the unreported judgment of this High Court in MACMA No.267 of 2007 dated 24.03.2014. He thus prayed to allow the appeal.

b) Nextly, he argued that compensation awarded is too low and the Tribunal ought to have considered his disability as 100% as his left foot was amputated.

6) Per contra, opposing the appeal, learned counsel for 2nd respondent/Insurance Company argued that the evidence would clearly show that claimant travelled in the vehicle only as an authorized passenger and as such, his risk would not be covered under the terms of the policy and the Tribunal rightly exonerated the

Insurance Company. With regard to alternative argument of the claimant, he submitted that merely because claimant fell down from the lorry and thereafter the lorry hit him, he will not turn into a third party from the status of an authorized passenger. He thus prayed to dismiss the appeal.

7) In the light of above arguments, the point for determination is:

"Whether the finding of the Tribunal in exempting the Insurance Company is sustainable?"

8 a) **POINT**: On a perusal of evidence on record, I agree with the finding of the Tribunal that claimant travelled in the lorry not as a labourer but as an unauthorized passenger. Hence, now, the alternative argument of the claimant has to be looked into. The argument of the claimant is that at the crucial moment before the accident, the driver applied sudden breaks, the claimant fell down and totally disembarked from the vehicle and thereafter the lorry ran over on his left foot. So, he met with the accident as a third party but not as gratuitous or unauthorized passenger.

b) In this context, a similar question came up for consideration of this High Court in ***National Insurance Company Limited vs. Smt. Zuleka Begum***. A learned Judge of this High Court observed thus:

> "10) Now the alternative argument of learned counsel for respondents/ claimants has to be scrutinized. According to him, when once the deceased fell down from the lorry due to sudden applying brakes by the driver, he became a third party with reference to lorry, as he totally disembarked from it and thereafter, when the lorry ran over him, it shall be deemed that he died in the capacity of a third party but not as a passenger of the lorry. To buttress his argument, he relied upon the decision of our High Court reported in ***United India Insurance Company Limited rep. by its Branch Manager vs. Kurva Yejju Mallamma and others*** (1 supra). In that case, when the deceased was getting down from the lorry, the driver

suddenly moved the same in a rash and negligent manner and thereby the deceased suffered severe injuries and succumbed to death on the spot. In the resultant claim petition, the Insurance Company sought to repudiate its liability on the contention that the deceased being a gratuitous passenger, policy would not cover his liability. In that context, 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 thus:

"13. That having regard to aforesaid principles, the only conclusion which can be arrived in this case is that the deceased no longer remains as a passenger, either gratuitous or otherwise, but wholly stands on the footage of a third party. Therefore, there is no substance in the plea raised by the appellant/insurance-company and there is no escape from its liability."

The ratio in the above and other aforesaid mentioned decisions is that when a person while getting into or alighting from a vehicle fell down and injured, he will no longer remain as a passenger but a third party. When the above ratio is applied to the instant case, admittedly the deceased fell down from the lorry when its driver applied sudden brakes and thereafter the rear tyres of the lorry ran over the deceased and caused his death. Therefore, as rightly argued by the learned counsel for respondents/claimants the deceased met with his death as a third party. In such an event, the policy shall invariably cover his risk."

c) Similar, view was expressed by another learned single Judge of this High Court in ***Sriram Anjamma v. G.Narayana Swami***.

d) In the instant case, the evidence of PW1 is to the effect that due to the rash and negligent driving of the driver of the lorry he fell down from the cabin and the wheel of the lorry ran over on his left foot causing crush injury. In the cross-examination also he deposed in similar manner. He stated that after completing the work at Saw Mill, he boarded the lorry to go to Patancheru to have a lunch and after he boarded, the lorry proceeded and a car came on the way and the driver of the lorry applied sudden breaks thereby he fell down from the cabin of the lorry and the wheel of the lorry ran over his left leg. Thus, his evidence clinchingly shows that at the crucial moment of the accident, he was on the road and therefore, he ceased to be an unauthorized passenger and metamorphosised into a third party and then lorry injured him as a third party. Since Ex.B5—policy covers the risk of third party, Insurance Company can also be fastened with liability.

e) Sofaras the claim for enhancement is concerned, a perusal of the award shows that compensation awarded under different heads is just and reasonable one and so there is no need to review the same.

9) In the result, this MACMA is allowed and ordered as follows:

a. Both the owner and insurer (respondents 1 and 2 in OP) are liable to pay compensation awarded by the Tribunal to the claimant.

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

c. No order as to costs in the appeal.

U. DURGA PRASAD RAO, J

Date: 06.04.2015

Note: L.R Copy to be marked: YES / NO

Murthy