IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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MACMA No.1168 of 2009

Between:

United India Insurance Company Limited ..Petitioner

And

1. Boini Anwesh and another .. Respondents

DATE OF JUDGMENT PRONOUNCED: **03.08.2015**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to see the fair copy of the Judgment? Yes / No

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A. No.1168 of 2009

JUDGMENT:

Aggrieved by the Award dated 23.03.2007 in O.P.No.165 of 2005 passed by the Chairman, M.A.C.T-cum-II Additional District Judge, Karimnagar at Jagtial, (for short "Tribunal"), the second respondent—United India Insurance Company Limited preferred the instant appeal.

2 a) The factual matrix of the case is thus:

The case of the claimant is that on 01.01.2005 he along with his friend Gosukula Karunakar was proceeding from Israjpally village to Jagital on a TVS Motor Cycle and when they reached near Rapelly village, they overtook a jeep bearing No. AEK 3455 and at that time, an auto bearing No.AP 15 W 8790 came in opposite direction in a rash and negligent manner and dashed against his vehicle. In the resultant accident, the claimant received head injury and other injuries. Immediately he was admitted in Government Hospital, Jagtial, for treatment. Thereafter, he was shifted to Yashoda Hospital, Hyderabad for better treatment and he spent considerable amounts. It is averred that the accident was occurred due to the rash and negligent driving of the crime vehicle. On these pleas, the claimants filed O.P.No.165 of 2005 under Section 166 of Motor Vehicles Act, 1988 (for short “the Act”) against respondents 1 and 2, who are the owner and insurer of the crime vehicle and claimed Rs.5,00,000/- as compensation.

b) Respondent No.1—owner-cum-driver of the auto filed counter stating that the accident was occurred not due to his fault or negligence but due to fault of the driver of motorcycle. He further stated the auto was insured with R2—Insurance Company, it has to indemnify the liability of R1 if any. He further contended that claim is highly excessive and exorbitant and thus prayed for dismissal of OP.

c) Respondent No.2—Insurer of auto filed Counter and opposed the petition contending that accident was occurred due to the rash and negligence of claimant. It is averred that initially FIR was registered against the claimant basing on the report given by his cousin brother and later the claimant managed the authorities and implicated the auto driver with a view to claim compensation. R2 further contended that compensation claimed is excessive and exorbitant and prayed to dismiss the O.P.

d) During trial, PWs.1 to 4 were examined and Exs.A1 to A42 were marked on behalf of claimant. Policy copy produced by R.2 was marked as Ex.B.1 on behalf of respondents.

e) On appreciation of both oral and documentary evidence the Tribunal awarded total compensation of Rs.1,30,000/- with costs and interest at 7.5% p.a. against respondent Nos.1 and 2.

Hence, the appeal by United Indian Insurance Company Limited.

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

4) Heard arguments of Sri Somanchi Venkateswarlu, learned counsel for appellant/ Insurance Company and Sri Ramachandra Rao Vemuganti, learned counsel for respondent 1 /claimant. Though notice sent to R2/owner of auto was served but there is no representation on his behalf, hence treated as heard.

5 a) Criticizing the Award, the learned counsel for appellant firstly argued that entire fault in the accident rests with the claimant himself as the FIR, which was lodged within a short time after the accident, will show that while overtaking a jeep, the claimant went on wrong side and dashed the opposite coming auto. He submitted that at the inception, FIR was registered against the claimant himself, but, however, the claimant could manage the police and saw that ultimately charge sheet was laid against the auto driver. He, thus, prayed to fix liability on the claimant.

b) Secondly and alternatively he argued that if for any reason entire fault is not fixed on the claimant, at least contributory negligence may be fixed on him as he drove the vehicle as a minor and without having valid driving license and thus he contributed for the accident.

6) Per contra, severely opposing the appeal, learned counsel for respondent/claimant argued that though initially FIR was registered against the claimant basing on the report of the complainant who was not an eye witness, but after full-fledged investigation, Pw.4—

Investigating Officer laid charge sheet against the driver of the auto and he obtained permission of the D.S.P for deleting the claimant from the array of accused and therefore it is futile to contend that the claimant was at fault. Sofaras the plea of contributory negligence is concerned, he argued that merely because the claimant was an under aged person, that cannot be a ground to hold automatically that he contributed for the accident. The plea of contributory negligence must be established by cogent evidence, but the insurance company has not examined the auto driver or any other relevant witness to establish the said plea. He relied upon a decision reported in ***Meera Devi and another Vs. Himachal Pradesh Road Transport Corporation and others***.

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

"Whether the award of the Tribunal insofar as fixing liability on the auto driver is factually and legally sustainable?"

8) **POINT**: The Accident, involvement of the motor cycle and auto and the injuries to the claimant are not in dispute. The bone of contention is about the fault of the auto driver. The claimant's version is that on 01-01-2005 at 3.00 PM while he was driving the TVS Victor from Israjpalli to Jagital along with his cousin brother Karunakar as pillion rider and when they passed Rapalli outskirts, a jeep was proceeding ahead of them and the jeep driver gave side to them and when he overtook the jeep and proceeding slowly, the offending auto came in opposite direction being driven by its driver in a rash and negligent manner and dashed their two wheeler and thus caused the accident. Thus, according to him, the accident was occurred due to the fault of the auto driver. He denied the suggestion that the accident was occurred due to his own negligence. This is the version of PW.1 regarding the manner of occurrence of accident. Then a perusal of Ex.A.1—FIR shows that after knowing about the accident, another cousin brother of the claimant namely B. Suresh Kumar gave report to Police. In his

report, he mentioned that after overtaking a jeep, the claimant went and dashed the opposite coming jeep and basing on his report, the police initially registered the FIR against the claimant. However, after investigation PW.4 laid Ex.A.4—Charge sheet against the auto driver holding that he was responsible for the accident. PW.4 addressed Ex.A.41—Letter to DSP, Jagtial, seeking permission to delete the name of claimant from the accusation. PW.4 narrated these facts in his evidence. Giving reasons for his conclusion, he categorically deposed that his investigation disclosed that the claimant was not at fault and the accident was occurred on account of rash and negligent driving of the auto by its driver. He stated that DSP was convinced with his finding and gave permission under Ex.A.42—Memo to delete the name of claimant from the accusation. He denied the suggestion that he colluded with the claimant. Ex.P.41 reads that there was no negligence on the part of the claimant as he drove the vehicle by taking all precautions, but the auto driver came in opposite direction in a rash and negligent manner with high speed and dashed against the motor cycle.

9) So, the evidence of PWs.1 and 4 and EXs. A.4, A.41 and A.42 would cumulatively show that the auto driver was responsible for the accident. The insurance company or the owner of the auto have not produced any contra evidence by examining the auto driver to establish that he was not responsible for the accident. In these circumstances, the Tribunal was right in fixing the liability on the auto driver. Hence, the prime argument of learned counsel for appellant that the claimant was responsible for the accident has no legs to stand.

10) Then his alternative argument that since the claimant was a minor and had no valid driving license and as such, contributory negligence has to be fixed on him is concerned, this argument also do not hold water because of the above finding that the auto driver himself was responsible for the accident. Merely because the claimant was under aged, on that count alone contributory

negligence cannot be fixed on him. For fixing contributory negligence, the party who pleads the same, shall adduce cogent evidence in that regard. That is not the case here. In **Meera Devi**'s case (1 supra) replied upon by learned counsel for respondent, the same fact was reiterated. In that case also, the deceased being less than 18 years drove the scooter and on the way it dashed against a bus. Against the claim, it was contended that bus driver was not responsible for the accident. But, the tribunal on appreciation of evidence held that the bus driver was at fault. However, the High Court of Himachal Pradesh held that since the deceased was not even being 18 years old could not have been permitted to drive the scooter, the accident in question was occurred due to contributory negligence on the part of the deceased and the bus driver. The said verdict was challenged before the Hon'ble Apex Court by the claimants. The Apex Court observed in para No.10 is as follows:

> " To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case".

11) In the instant case also, as discussed earlier, there is no evidence on the part of the insurer and insured to prove either the claimant was totally responsible for the accident or at least he contributed for the accident. Hence, this alternative argument also does not hold water.

12) In the result, I find no merits in the appeal and accordingly this

appeal is dismissed by confirming the Award passed by the Tribunal in M.V.O.P.No.165 of 2005. No costs in the appeal.

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

U. DURGA PRASAD RAO, J

Date: 03.08.2015

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HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

<u>MACMA No.1168 of 2009</u>

Dt. 03-08-2015

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