THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A. No.1267 of 2009

JUDGMENT:

Aggrieved by the Award dt:04.02.2009 in M.V.O.P.No.217 of 2006 passed by the Chairman, M.A.C.T-cum-Special Sessions Judge-cum-X Additional District Judge, Krishna at Machilipatnam (for short 'the Tribunal'), the claimant preferred the instant appeal.

2) The factual matrix of the case is thus:

a) On 01.03.2006, the minor injured claimant who was aged about 13 years, along with his sister—Sirisha and grandmother—Veera Raghavamma went to Tirunallu in his village, while they were returning at about 10:00 pm and when they reached near the MDO office centre, Kalidindi, a motorcycle bearing No.AP 37AD 4116 being driven by its driver at high speed and in a rash and negligent manner, dashed the claimant resulting in fracture injuries to him. Immediately the claimant was admitted in Ashram Hospital, Eluru where he was treated as inpatient from 01.03.2006 to 24.03.2006 by spending huge amount of Rs.1,00,000/-. It is averred that the accident was occurred due to rash and negligent driving by the driver of the offending motorcycle. On these pleas, the claimant filed M.VO.P.No.217 of 2006 under Section 163A of Motor Vehicles Act, 1988 (for short "the Act") against respondent Nos.1 to 3, who are driver, owner and insurer of the offending motorcycle and claimed Rs.2,00,000/- as compensation.

b) R.1/rider of motorcycle filed counter contending that accident was occurred due to negligent road crossing of minor boy himself and there is no fault on his part and prayed to dismiss the petition.

c) R.2/owner remained ex-parte.

d) R3/Insurance Company filed counter denying all the material averments and contended that the accident was occurred due to the fault of minor claimant himself and R1 had no valid and effective driving licence at the time of accident and as such, the Insurance Company is not liable to pay compensation and prayed to dismiss the OP.

e) During trial, PWs.1 to 4 were examined and Exs.A1 to A9 were marked on behalf of claimant. RWs.1 and 2 were examined and Exs.B1 to B8 were marked on behalf of respondents.

f) The Tribunal basing on the evidence on record held that R1 was responsible for causing the accident and accordingly awarded total compensation of Rs.92,000/- with proportionate costs and interest at 7.5% p.a. against R1 and R2 under different heads as below:

For disability	Rs. 50,000-00
Loss of amenities, future discomfort and pain and suffering	Rs. 20,000-00
Medical expenses	Rs. 15,000-00
Attendant charges, damages to clothing and extra-nourishment	Rs. 7,000-00

Total Rs. 92,000-00

The Tribunal exonerated the R.3/Insurance Company.

Hence, the appeal by claimant.

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

4) Heard arguments of Sri G.Narasimha Rao, learned counsel for appellant/claimant; Sri Ramatirtha Yallabandi, learned counsel for R1 and Sri P.Harinatha Gupta, learned counsel for respondent No.3/Insurance Company. Though notice to R2 was served but there is no representation on his behalf, hence treated as heard.

5 a) Learned counsel for appellant/claimant challenged the award on two fronts that the Tribunal erred in exonerating the third respondent/Insurance Company totally from its liability on the ground that respondents 1 and 2 violated the terms of the policy inasmuch as R.1—the driver had no valid driving licence and secondly, he challenged the award on the ground that compensation awarded was too low and at any rate it was not just and reasonable. Expatiating, he argued that the Tribunal failed to appreciate that in a case of third party, the liability of Insurance Company will be absolute if the policy is in force as in the instant case and in that view of the matter, the Tribunal ought to have fastened liability on the Insurance Company also. Licence issue is concerned, the burden will be always on the Insurance Company to establish that the concerned driver at the

relevant time of accident had no valid and effective driving licence and by mere giving notice to driver and owner to produce the licence will not absolve the Insurance Company from its burden. On this proposition of law, he relied upon the judgment of this High Court reported in ***National Insurance Company Limited rep. by its Divisional Manager, Ongole vs. Parital Venkateswarlu and another*[1]*.*** He alternatively submitted, even assuming that the Insurance Company by giving notice could establish the lack of driving licence by the driver, still it cannot repudiate its liability unless it establishes another crucial fact that the owner has knowingly allowed the unlicensed driver to drive the vehicle. Even if these two aspects are successively established, still the Tribunal by virtue of the judgment of the Apex Court in the famous case of ***National Insurance Company Limited vs. Swaran Singh and others***[2] can direct the Insurance Company to pay the compensation and recover from the insured since the victim happens to be a third party. He thus, at the first instance prayed to fasten the full liability on the Insurance Company and alternatively direct the Insurance Company to pay and recover from the insured.

b) Secondly, challenging the quantum of compensation, he argued that the victim in this case was a minor boy of 13 years age who suffered fracture of both bones of left leg due to rash and negligent driving of the rider of the motorcycle and he underwent treatment in Ashram Hospital, Eluru in two spells and implants were inserted in his left leg and he suffered 25%

disability but the Tribunal awarded only a meager amount of Rs.7,000/- towards attendant charges and it also awarded a pittance of Rs.50,000/- towards disability. He thus prayed to review the compensation.

6) Per contra, learned counsel for R.3/Insurance Company while supporting the award, argued that, in this case that the 1st respondent/driver had no valid driving licence was amply established by the Insurance Company by giving notice to claimant as well as respondents 1 and 2 to produce the driving licence particulars but they failed and not stopping there, the Insurance Company appointed an Advocate Investigator who on investigation found the driver had no valid driving licence and therefore, the Tribunal rightly exonerated the Insurance Company from its liability. Regarding quantum of compensation, he argued that compensation awarded under different heads was just and reasonable and there is no need to revise the same. He thus prayed to dismiss the appeal.

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

1) *Whether the award passed by the Tribunal is factually and legally sustainable?*

2) *To what relief?*

8) **POINT No.1**: The accident, involvement of the motorcycle bearing No.AP 37 AD 4116 and the minor claimant suffering injuries to his left leg in the resultant accident are all admitted facts. The main contention of Insurance Company before the

Tribunal was that the driver of the motorcycle had no valid driving licence which was ultimately found favour with the Tribunal. Be that it may, it is needless to emphasize that the burden of proof of the allegation or the plea that the driver concerned had no valid and effective driving licence at the relevant time of accident squarely rests on the Insurance Company. In the instant case, the evidence of RW.1—the Branch Manger of R.3 is that as per mentioning in Ex.B.3—charge sheet, the driver had no valid driving licence. Further, the Insurance Company appointed an Advocate, who investigated the matter and filed Ex.B.2—report which also shows that the driver had no valid driving licence and further, the Insurance Company issued notice to claimant's counsel and also to Respondents 1 and 2 to produce driving licence particulars but they failed. Thus RW.1 claimed that the Insurance Company discharged its burden. The Tribunal it appears, having relied upon this evidence and also relying upon the decision reported in ***Sardari and others vs. Sushil Kumar and another***[3] exonerated the Insurance Company. In my view, it is a fit case to direct the Insurance Company to pay compensation and recover from the insured for the following reasons. In this case first and foremost, Ex.B.1—policy was admittedly in force by the date of accident which relates to the injuries suffered by a third party. In such circumstances, the liability of Insurance Company will be absolute. Coming to the defence plea that the driver had no valid driving licence, the burden of proof is squarely on the Insurance Company to establish the same. In the case of ***Parital Venkateswarlu***'s case (1 supra), a learned Judge of this High Court observed that mere issuing notice to respondent's owner or driver to produce driving licence will not absolve the onus of Insurance Company to prove its stand. He observed thus:

> *"Para 20: From the above excerpted passages it is obvious that the burden is cast upon the insurer not only to prove its defence which it is entitled to take under the provisions of Section 149(2) of the Motor Vehicles Act, but must also establish breach on the part of the owner of the vehicle the conditions of the policy. To avoid the liability, the insurer must further prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of the vehicle by duly licenced driver. Above all, it is further obvious that it must be a case even where the insurer is able to prove breach on the part of the insured of the policy condition, the insurer would not be allowed to avoid its liability towards insured unless the said breach of the condition of driving licence is so fundamental and is found to have contributed to the cause of the accident. Therefore, apart from the proof that it is a case of breach of the condition of the policy by the policy holder, the insurer cannot be permitted to avoid its liability on that ground alone, unless it is able to show that the said breach is so fundamental that it contributed to the accident, obviously, therefore, the insurer is obliged to prove these aspects."*

Therefore, mere issuing notice will not be sufficient to absolve the Insurance Company from its liability. In this case we do not know what investigation was made by the investigator to come to the conclusion that the driver had no valid driving licence. In the charge sheet, a stray sentence has been mentioned as if the accused/driver had no valid driving licence but he was not charge-sheeted for the offences under the relevant provisions of M.V.Act and he was charged for the offence under Sec.338 IPC only. The Insurance Company failed to establish that the owner knowingly allowed the driver to drive the motorcycle and the breach of the policy was so fundamental to cause the accident. Hence for all these reasons, it can be held that the Insurance Company shall pay compensation at first and recover the same from the insured/R.2 i.e, owner of the vehicle.

9) Sofaras quantum of compensation is concerned, I find some force in the contention of claimant. As per the evidence of PW.2—the doctor and Ex.A.7—disability certificate, the claimant suffered 25% disability. Having regard to it, compensation of Rs.50,000/- appears to be too low and hence the same is enhanced to **Rs.75,000/-**. The compensation awarded under other heads appears to be reasonable.

For disability	Rs. 75,000-00
Loss of amenities, future discomfort and pain and suffering	Rs. 20,000-00
Medical expenses	Rs. 15,000-00
Attendant charges, damages to clothing and extra-nourishment	Rs. 7,000-00
Total	Rs.1,17,000-00

So at the outset, the compensation awarded by the Tribunal is enhanced by Rs.25,000/- (Rs.1,17,000/- minus Rs.92,000/-).

10) **POINT No.2**: In the result, this M.A.C.M.A is partly allowed

and ordered as follows:

a) The compensation is enhanced by **Rs.25,000/-** with proportionate costs and simple interest @ 7.5% per annum from the date of OP till the date of realization.

b) Respondent No.3/Insurance Company shall at first pay compensation and then recover the same from the insured/ Respondent No.2. It shall pay compensation amount within two(2) months from the date of this judgment failing which execution can be taken out.

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

U. DURGA PRASAD RAO, J

Date: 24.08.2015
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[1] 2008(4) ALT 521
[2] (2004) 3 Supreme Court Cases 297
[3] 2008 ACJ 1307