

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.No.56 of 2009

JUDGMENT:

Challenging the compensation awarded in O.P.No.1040 of 2004 dated 12.12.2007 by the Chairman, M.A.C.T-cum-I Additional District Judge, Khammam (for short “the Tribunal”), the second respondent—Oriental Insurance Company Limited, Karimnagar preferred the instant appeal.

2) The factual matrix of the case is thus:

a) Claimant No.1 is the widow, claimant Nos.2 and 3 are the children and claimant Nos.5 and 6 are parents of the deceased—Dharmarajula Venkata Prasad Rao. The case of the claimants is that on 18.04.2004 when the deceased was going on his Suzuki motorcycle bearing No.AP 20 D 9542 and when he reached near Ayyappa Swamy Temple in Nayakulagudem village at about 11 PM, a bus bearing No.AP 09 V 3636 belonging to Krishna Travels came in the opposite direction being driven by its driver in a rash and negligent manner and dashed the motorcycle, due to which the deceased fell down on the road and received bleeding head injuries and immediately he was shifted to Government Hospital, Kothagudem and during the course of treatment he succumbed to injuries. It is averred that driver of the bus was responsible for the accident. On these averments the claimants filed O.P.No.1040 of 2004 under Section 166 of Motor Vehicles Act, 1988 (for short “M.V Act”) against respondents 1 and 2, who are the owner and insurer of the van and claimed Rs.15,00,000/- as compensation under different heads mentioned in OP.

b) R1—owner remained exparte.

c) R2—Insurance Company filed counter and opposed the petition contending that driver of the bus was not at fault and motorcyclist has no valid driving licence at the time of accident. R2 also contended that owner and insurer of motorcycle who are the necessary parties, have not been impleaded to the petition and therefore, Insurance Company is not liable to pay any compensation. R2 further contended that compensation claimed is excessive and exorbitant and prayed for dismissal.

d) During trial, PWs.1 and 2 were examined and Exs.A1 to A6 were marked on behalf of claimants. RW1 was examined and Exs.B1 and B2 were marked on behalf of respondents.

e) On appreciation of both oral and documentary evidence the Tribunal awarded total compensation of Rs.9,85,000/- with costs and interest at 7.5% p.a. against respondents 1 and 2 under the following heads:

Loss of dependency	Rs. 9,60,000-00
Loss of consortium	Rs. 15,000-00
Loss of estate	Rs. 10,000-00

Total	Rs. 9,85,000-00

Hence, the appeal by Insurance Company.

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

4) Heard arguments of Sri Katta Laxmi Prasad, learned counsel for appellant/ Insurance Company; Sri P.Prabhakar Reddy, learned counsel for respondent Nos.1 to 6/claimants. Notice sent to R7/owner was not served.

5a) Opposing the claim, learned counsel for appellant firstly argued that the Tribunal erred in relying upon Ex.A6—salary certificate and thereby taking the daily income of the deceased as Rs.320/-. He argued that except filing Ex.A6—salary certificate the claimants have not filed any supporting documents like service register, acquittance register etc. to prove the employment and income of the deceased. In their absence Ex.A6 will not have any evidentiary value.

b) Secondly, he argued that deceased had no valid driving licence and claimants have not produced his driving licence during trial and therefore the tribunal ought to have held that the deceased also contributed for the accident.

c) Nextly, learned counsel argued that in this case the driver of the offending bus is a necessary party to the claim inasmuch as according to the claimants, he caused the accident and he is the first tortfeasor. The claimants must first show him as one of the respondents to the claim petition and establish his fault in his presence and then only the owner of the vehicle will be vicariously liable and then the insurer will be liable to indemnify his liability. Hence, the claim is bad for non-joinder of necessary party i.e. driver of the bus. In this regard, he relied upon the judgment of this High Court in MACMA No.188 of 2007 dated 16.12.2014 (unreported). He thus prayed to allow the appeal.

6a) Per contra, learned counsel for respondents/claimants while supporting the award firstly contended that the deceased worked as General Mazdoor in Singareni Collieries Company Limited (SCCL) which is a Government Company and Ex.A6—salary certificate was issued by the Superintendent of Mines who appeared in the Court and gave evidence as PW2 and therefore, the authenticity of Ex.A6 need not be doubted. He contended that merely because monthly pay slip or service register of the deceased were not produced, on that count the genuinity

of Ex.A6 cannot be doubted. He argued that Tribunal rightly accepted Ex.A6 and fixed the daily income of the deceased as Rs.320/-.

b) Secondly, he argued that claimants produced the available documentary evidence i.e. Ex.A2—charge sheet and Ex.A3—MV Inspector report which could establish the fault of driver of the bus and the Insurance Company had not adduced any contra evidence to prove that either the bus driver was not responsible for the accident or that the deceased contributed for the accident as now contended in the appeal, and therefore, the Tribunal rightly held that accident was occurred due to the rash and negligent driving of the driver of the bus.

c) Thirdly, learned counsel argued though as per the judgment of this High Court the driver of the bus is a necessary party, respondents have not taken a plea in the written statement that OP was bad for non-joinder of driver and therefore, the appellant/Insurance Company now cannot contend for the first time in the appeal that OP is bad for non-joinder of the driver. He further argued that the cited judgment was based on Supreme Court judgment rendered in the year 2007 and the said judgment could operate only prospectively. Since the accident was occurred long prior to the said judgment, it cannot be held that OP is bad for non-joinder of driver. He thus prayed to dismiss the appeal.

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

“Whether the judgment of the Tribunal is factually and legally sustainable?”

8a) **POINT:** Accident, involvement of Suzuki motorcycle bearing No.AP 20 D 9542, bus bearing No.AP 09 V 3636 and death of deceased are not in dispute. The bone of contention is in respect of quantum of

compensation and non-joinder of necessary party. The claimants case is that the deceased was working as General Mazdoor in SCCL and earning salary of Rs.10,000/- per month. In proof of his employment and salary they produced Ex.A6—salary certificate and examined PW2, Superintendent of Mines in SCCL. He deposed that the deceased worked as General Mazdoor in SCCL and he was born on 18.12.1064 and would have attained retirement on superannuation on 01.01.2025. He stated that salary of the deceased by the time of his death was Rs.356.63 ps. per day. He further stated that General Mazdoor will work for 25 to 26 days in a month. The lower Tribunal basing on this evidence fixed daily earning of the deceased at Rs.320/- and as his work stint was 25 days per month, it arrived the annual income of the deceased at Rs.96,000/- (Rs.320 x 25 x 12). Going by his age as 40 years, the Tribunal selected '15' as multiplier and arrived loss of dependency at Rs.9,60,000/- (Rs.96,000 x 15 x 2/3).

b) Now, the first and foremost contention of the learned counsel for appellant is that Tribunal has committed gross error in accepting Ex.A6 for computation of loss of dependency. It is argued that claimants have not produced monthly pay slip, service register, acquittance register etc. in support of Ex.A6 to prove the employment and annual income of the deceased and therefore, Ex.A6 has no evidentiary value. I am afraid this argument is not correct. The claimants have not simply produced Ex.A6. On the other hand, they have examined PW2 who is the Superintendent of Mines in SCCL which is a Government Company. I see no reason for PW2, who in fact issued Ex.A6—certificate to depose falsehood about employment particulars of deceased and nothing is brought on record to disbelieve his evidence. The oral evidence of PW2 and contents in Ex.A6 amply establish employment and the income of the deceased. Therefore, the compensation assessed by the Tribunal cannot be found fault.

c) The next contention of the appellant is that claimants have not filed the driving licence of deceased and so it must be held he had no driving licence and thus he contributed for the accident. It is true that claimants have not produced driving licence of the deceased who drove the motorcycle at the time of accident. The point is whether on that count it should be held there was contributory negligence on his part. The claimants produced available documents Ex.A2—charge sheet and Ex.A3—MV Inspector report which would show that police after thorough investigation laid charge sheet against bus driver holding that he was responsible for the accident. Before the lower Tribunal neither the owner of the bus nor the Insurance Company produced any evidence to establish that the deceased was responsible for the accident or at least he contributed for the accident. Without there being a positive evidence, the contributory negligence cannot be presumed merely because the claimants have not produced driving licence of the deceased.

9) Then, the next contention of learned counsel for appellant is that the OP is bad for non-joinder of driver of the bus as he is the principal tortfeasor and since the claim is one under Section 166 of MV Act, it is trite for the claimants to establish the fault of the driver by arraying him a party and then only the vicarious liability will be shifted to the owner and liability of indemnification then shift to Insurance Company.

10) In the cited decision, learned single Judge of this High Court basing on the Apex Court decisions and Rule 471 (4) of A.P. Motor Vehicle Rules 1989 (for short 'MV Rules') has held that driver is also a necessary party in MVOP and directed the Registry to circulate copy of the judgment to all the Tribunals for mandatory compliance of impleadment of the driver in pending claim petitions under Section 166 of MV Act and for further compliance of Rule 471(4) of MV Rules. Thus, the

cited decision can be made applicable only prospectively in pending MVOPs.

a) Further, in the instant case the 2nd respondent/Insurance Company has not taken a specific plea to the effect that driver is a necessary party and OP is bad for his non-joinder. Hence, though several issues were framed, no issue touching this aspect was framed by the Tribunal and it passed the award on the issues framed long prior to the cited decision. As such it is not permissible for appellant to raise the issue of non-joinder of driver for the first time in the appeal. Hence, this argument cannot be accepted. Thus at the outset, I find no merits in the appeal.

10) In the result, this MACMA filed by the Insurance Company is dismissed by confirming the award passed by the Tribunal in O.P.No.1040 of 2004. In the circumstances of the case, there shall be no order as to costs.

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

U.DURGA PRASAD RAO, J

Date: 23.09.2015
Murthy