HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

M.A.C.M.A. No.2138 of 2009

JUDGMENT:

Feeling aggrieved by the judgment and award dated 10.4.2007 passed in M.V.O.P. No.116 of 2003 on the file of the Motor Accidents Claims Tribunal-cum-II Additional District Judge, Kadapa at Proddatur, the insurance company preferred this appeal.

2. The parties will hereinafter be referred to as they are arrayed before the Tribunal for the sake of convenience.

3. The facts leading to filing of the present appeal, in brief, are as follows: On 08.5.20002, Shaik Khasim boarded the lorry bearing No.AP 16X 53 belongs to the first respondent. When the lorry reached Popular Cold Storage, Guntur, the driver of the lorry had driven the same in a rash and negligent manner due to which the lorry turned turtle and in the said accident, Khasim (hereinafter referred to as, the deceased) and four others died on the spot. The accident occurred due to rash and negligent driving of the driver of the lorry against whom the Station House Officer, Guntur Taluk Police Station registered a case in Crime No.153 of 2002 under Sections 304-A IPC. By the time of the accident, the deceased was aged about 30 years and used to earn Rs.100/- per day by working as Hamali. The first petitioner is the wife, petitioner Nos.2 to 5 are the children and sixth petitioner is the mother of the deceased, who are solely dependant on the earnings of the deceased. Due to sudden demise of the deceased, the petitioners lost source of income. The lorry, which belongs to the first respondent, was insured with the second respondent with effect from 14.12.2001 to 13.12.2002. Therefore, the respondent Nos.1 and 2 are jointly and severally liable to pay compensation of Rs.2,50,000/- to the petitioners with interest and costs.

4. The first respondent filed counter *inter alia* contending that the lorry bearing No.AP 16X 53, which was registered as a goods vehicle was meant only for transportation of the goods but not for carrying passengers. Prior to the accident, the driver of the lorry had not obtained permission of this respondent for allowing the deceased and others to travel in the lorry as unauthorized passengers. The driver of the lorry had acted beyond the scope of his employment and therefore, the first respondent is not liable to pay compensation to the petitioners. The compensation claimed by the petitioners under various heads is highly excessive and exorbitant. The petition is bad for non-joinder of the driver of the lorry and therefore, the petition is liable to be dismissed.

5. The second respondent filed counter denying all the averments made in the petition *inter alia* contending that by the time of the accident, the deceased and others were travelling in the lorry as unauthorized passengers and thereby the first respondent violated the terms and conditions of the policy. For such violation, the second respondent is not liable to pay compensation to the petitioners. The amount of compensation claimed by the petitioners under various heads is highly excessive and exorbitant. Hence, the petition is liable to be dismissed so far as the second respondent is concerned.

6. Basing on the above pleadings, the Tribunal framed the following issues:

1) Whether the deceased by name, Shaik Khasim, died in a motor vehicle accident that occurred on 08.5.2002 at 8.00 AM due to rash and negligent driving of lorry bearing No.AP 16X 53?
2) Whether the petitioners are entitled to compensation and if so to what amount and from whom?
3) To what relief?

7. The Tribunal clubbed O.P.No.116 of 2003 along with O.P. Nos.111, 112 and 113 of 2003 and recorded evidence in O.P.No.113

of 2003. During the course of the trial, on behalf of the petitioners, P.Ws.1 to 5 were examined and Exs.A1 to A11 were marked. On behalf of the second respondent, R.W.1 was examined and Ex.B1 was marked.

8. Basing on the oral, documentary evidence and other material available on record, the Tribunal arrived at a conclusion that the accident occurred due to rash and negligent driving of the driver of the lorry, which resulted in the death of the deceased, and allowed the petition in part by awarding compensation of Rs.1,60,000/- with interest at 7.5% per annum, directing the respondent Nos.1 and 2 jointly and severally pay the compensation. Hence, the second respondent preferred the present appeal.

9. Heard Sri Kota Subba Rao, learned standing counsel for the appellant – second respondent, Sri T.Ravi Kumar, learned counsel for the owner of the lorry – first respondent and Sri K.Rathanga Pani Reddy, learned counsel for the claimants – petitioners.

10. The contention of the learned counsel for the appellant is three fold:

(1) The Tribunal having arrived at a conclusion that the deceased was travelling as unauthorized passenger ought not to have fastened the liability on the insurance company;

(2) The Tribunal misconstrued the judgments of the apex court and fastened the liability on the insurance company; and

(3) The judgment and award passed by the Tribunal is not sustainable viewed from factual or legal aspects.

Per contra, the learned counsel for the claimants submitted that the Tribunal, basing on the judgments of the apex court, rightly fastened the liability on the insurance company. He further submitted that there are no grounds much less legally valid grounds to interfere with the judgment and award of the Tribunal.

11. Now the point that arises for consideration in this appeal is:

> *Whether the first respondent had violated the terms and conditions of the policy so as to absolve the liability of the second respondent – appellant?*

Point:

12. The second respondent is not disputing the manner of the accident and cause of the death of the deceased. As per the finding of the Tribunal, on issue No.1, the accident occurred due to rash and negligent driving of the driver of the lorry, which resulted in the death of the deceased. In fact, the second respondent is not challenging the finding recorded by the Tribunal on issue No.1. Hence, there is no need to discuss this issue in this appeal.

13. The learned standing counsel for the second respondent in all fairness submitted that the insurance company–second respondent is not disputing the quantum of compensation awarded by the Tribunal. The claimants did not choose to file appeal or cross-objections challenging the quantum of compensation awarded by the Tribunal. Hence, I am not inclined to express any opinion on quantum of compensation awarded by the Tribunal.

14. The oral testimony of R.W.1 coupled with Ex.B1 reveals that the offending lorry is a goods vehicle. The first respondent has taken a specific plea in the counter that the offending vehicle is a goods vehicle and the driver allowed the deceased and four others to travel in the lorry without his prior permission. This particular fact was not denied by the petitioners. The second respondent has taken a specific plea in the counter that by the time of the accident, the deceased was travelling in the lorry as an unauthorized passenger. It is not the case of the petitioners that by the time of the accident, the deceased was travelling in the lorry as owner of the goods or authorized representative of the owner of the goods. Basing on the material

available on record, the irresistible conclusion that can be drawn is that by the time of the accident, the deceased was travelling in the lorry as unauthorized / gratuitous passenger. The liability of the insurance company arises out of a contract or under a statute. The terms and conditions of Ex.B1 policy do not cover the risk of the unauthorized passengers. There is no statutory obligation on the part of the insurance company to pay compensation in case of death or injuries to the unauthorized passengers travelling in the goods vehicle. In para – 18 of the judgment, the Tribunal gave a specific finding that by the time of the accident, the deceased was travelling in the lorry as unauthorized passenger. The said finding recorded by the Tribunal became final in view of non-filing of appeal or cross-objections challenging the same by the claimants.

15. Now the crucial question is whether the Tribunal is justified in fastening the liability on the insurance company having arrived at a conclusion that the deceased was gratuitous passenger. The Tribunal fastened the liability on the insurance company placing reliance on the decision of the Hon'ble Supreme Court in **National Insurance Co. Ltd., v Baljit Kaur**[1]. For better appreciation, it is not out of place to extract hereunder paras 20 and 21 of the above judgment.

> 20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people.
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> 21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be

> as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in *New India Assurance Co. Ltd., v Satpal Singh*[2]. The said decision has been overruled only in *New India Assurance Co. Ltd., v Asha Rani*[3]. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding.

As per the principle enunciated in the case cited supra, the insurance company is not liable to indemnify the owner of the vehicle in case of death or injuries of gratuitous passengers. Similar view was expressed in **Oriental Insurance Co. Ltd. v Devireddy Kondareddy**[4], **Manager, National Insurance Co. Ltd., v Saju P. Paul**[5], **M.V. Jayadevappa v Oriental Fire & Insurance Co. Ltd.,**[6] and **National Insurance Co. Ltd., v Bommithi Subbhayamma**[7].

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Tribunal committed error by fastening the liability on the insurance company having arrived at a conclusion that

the deceased was travelling in the lorry as unauthorized passenger. The finding of the Tribunal that the insurance company has to indemnify the liability of the owner of the offending vehicle is not sustainable either on facts or on law and therefore, the said finding is hereby set aside. As the liability of the second respondent is absolved, the first respondent alone is liable to pay compensation to the petitioners. Accordingly, this point is answered in favour of the appellant – insurance company.

17. In the result, the appeal is allowed and the petition against the second respondent–insurance company is dismissed. The first respondent–owner of the vehicle alone is liable to pay compensation to the petitioners. If the petitioners have already withdrawn the amount deposited by the second respondent before the Tribunal, the second respondent is entitled to recover the same from the first respondent and not from the petitioners. Parties are directed to bear their own costs in this appeal. Miscellaneous petitions, if any pending in this miscellaneous appeal, shall stand closed.

T.SUNIL CHOWDARY, J

Date: 19.3.2015
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[1] (2004) 2 SCC 1
[2] (2000) 1 SCC 237
[3] (2003) 2 SCC 223
[4] (2003) 2 SCC 339
[5] (2013) 2 SCC 41
[6] (2004) 13 SCC 43
[7] (2015) 12 SCC 243