THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.No.957 of 2009

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Cross Objections (SR) No.16883 of 2009

Common Judgment:

Both the Insurance Company and the claimants have challenged the award dated 09.09.2008 in O.P.No.2223 of 2006 passed by the Motor Accidents Claims Tribunal-cum-XI Additional Chief Judge, Hyderabad District Judge (Fast Track Court), City Civil Court, Hyderabad (for short "the Tribunal), the former in the form of instant appeal and the latter in the form of cross-objections.

2) The factual matrix of the case is thus:

a) The deceased—Md. Basheer @Md. Basheer-Ul Huq works as labour contractor supplying labour to contractors. He was the owner of Hero Honda Motorcycle bearing registration No.AP 9 BD 3316. On 07.10.2006 at about 5.30 PM, while he was proceeding on his motorcycle from Arya Mysamma Temple towards Darga Khaliskhan side and when he reached Don Bosco School, another Pulsar motorcycle bearing No.AP 28 AS 4400 came in opposite direction in a rash and negligent manner and at high speed and hit the deceased. As a result, the deceased fell down on the road and received grievous injuries. Immediately he was shifted to Sadhana

Hospital and from there to NIMS Hospital, Hyderabad for better treatment where he succumbed to injuries. It is averred that due to sudden death of the deceased, the claimants became destitutes. On these pleas the claimants filed OP No.2223 of 2006 under Section 163-A of Motor Vehicles Act, 1988 (for short “MV Act”) claiming compensation of Rs.5,00,000/- under different heads mentioned in OP.

b) R1/owner of the offending motorcycle filed counter and denied the petition averments. He contended that vehicle in question was insured with the 2nd respondent/Insurance Company and compensation if any is awarded, the Insurance Company is liable to pay the same.

c) The second respondent/Insurance Company filed counter and opposed the claim, inter alia, contending that accident was occurred due to negligence of the deceased himself and therefore, Insurance Company is not liable to pay any compensation and thus prayed to dismiss the OP.

d) During trial P.Ws.1 and 2 were examined and Exs.A1 to A7 were marked on behalf of the claimants. RW1 was examined and Exs.B1 to B3 were marked on behalf of the respondents.

e) The Tribunal on appreciation of evidence on record awarded compensation of Rs.3,69,000/- under different heads as follows:

Loss of dependency including loss of consortium	Rs. 3,63,000-00
Transportation charges	Rs. 1,000-00
Funeral charges	Rs. 5,000-00

	Rs. 3,69,000-00

Hence the appeal and cross objections challenging the award.

3) Heard arguments of Sri Ravishankar Jandhyala, learned counsel for appellant/Insurance Company and Sri U.P.Rao, learned counsel for respondents 1 to 4/claimants and R5/owner is not a necessary party as per cause title.

4 a) Challenging the award, learned counsel for appellant/Insurance Company firstly argued that it is a case of collision between two vehicles, hence the Tribunal ought to have apportioned the liability between the two vehicles for contributory negligence, instead the Tribunal fixed the liability only on Pulsar motorcycle bearing No. AP 28 AS 4400 though police did not file any charge sheet against the concerned rider.

b) Secondly, he argued that the Tribunal erred in fixing liability on the Insurance Company in spite of the fact that the rider of the pulsar motorcycle had no driving licence. He pointed out that the Insurance Company issued notice to the owner under Ex.B2 to produce the driving licence of the rider of the motorcycle but the owner (R1 in OP) failed to produce the same and as such, for breach of the terms of policy the Tribunal ought to have exonerated the appellant/Insurance Company.

c) Thirdly, he argued the claim being one under Section 163A of MV Act compensation can be determined under this Section, only when the annual income of the victim of the accident does not exceed Rs.40,000/- as prescribed in the Second Schedule appended to Section 163A. However, in the instant case, the Tribunal fixed the annual income of the deceased as Rs.50,000/- and computed compensation following the Second Schedule and due to this procedural irregularity the award is vitiated. He thus prayed to allow the appeal and exonerate the Insurance Company from its liability.

5 a) In oppugnation, learned counsel for respondents 1 to 4/ claimants argued that except alleging contributory negligence, the Insurance Company or the owner of Pulsar motorcycle adduced any evidence to prove the contributory negligence on the part of deceased. On other hand, PW2 who is an independent witness clearly deposed that rider of Pulsar motorcycle was liable for accident and FIR was also registered against him. Since he too died in the accident, the police did not file charge sheet. As such, he argued, mere allegation of negligence without proof is not maintainable. In this regard, he relied upon the decision reported in ***K.Nagapadma Sridevi v. Oriental General Insurance Co. Ltd.***[1]

b) Secondly, regarding driving licence, he argued that burden is on the Insurance Company to prove that the driver of offending vehicle had no driving licence and owner committed breach thereof. Except filing alleged copy of notice and postal receipt, it did not establish the factum of lack of driving licence of driver through cogent evidence. Insurance Company did not file postal acknowledgement to show that notice calling for the driving licence particulars was served on the owner of the offending motorcycle. He further argued that though Insurance Company claimed to have appointed an investigator, he did not secure certificate from RTA authorities certifying that driver had no driving licence. So, the Insurance Company cannot contend that the owner committed breach of policy.

c) Thirdly, regarding maintainability of petition under Section 163A of MV Act, he argued that though the annual income of the victim of accident exceeds Rs.40,000/-, still the claim petition under Section 163A can be maintained and this aspect was clearly discussed by the Apex Court in the case of ***Smt.Sarla Verma vs. Delhi Delhi Transport Corporation***[2]. He thus argued that appeal is bereft of merits.

6 a) Then, arguing on Cross-objections filed by the claimants, he submitted that compensation awarded was too low inasmuch as the Tribunal took a low income of

Rs.50,000/- per annum for the deceased though he happened to work as labour contractor and getting Rs.6,000/- per month. Further, the Tribunal failed to add future prospectus to his income and thereby compensation for loss of dependency was considerably reduced. He argued that as per the decision of Apex Court in ***Rajesh and others vs. Rajbir Singh and others***[3] even self-employed persons deserve addition of future prospects to their income.

b) Nextly, he argued that the Tribunal has not granted separate compensation for loss of consortium and as per ***Rajesh***'s case (3 supra) the first claimant deserves Rs.1 lakh in this regard. Further, the children of deceased are entitled to compensation for loss of love and affection.

c) Finally, he argued that claimants are entitled to interest @ 9% per annum as held by the Supreme Court in ***Yerramma and others v. G.Krishna Murthy and another***[4].

He thus prayed to enhance the compensation.

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

"Whether the award passed by the Tribunal is factually and legally sustainable?"

8 a) The first argument of the appellant/Insurance Company is with regard to contributory negligence on the part of deceased. On perusal of record, I am afraid, this

argument does not carry conviction. PW2 an independent eye-witness in his evidence has clearly deposed that deceased was proceeding ahead of him on his Hero Honda motorcycle and when he reached Don Bosco School, the rider of crime vehicle i.e. Pulsar motor cycle bearing No.AP 28 AS 4400 came in the opposite direction at high speed and in a rash and negligence manner and hit the motor cycle of the deceased and caused the accident. In the cross-examination no suggestion was given to him that he was not an eyewitness to the accident. Therefore, it can be accepted that PW2 was an eyewitness. He was a third party and therefore, his evidence relating to manner of occurrence of accident can be believed which clearly depicts that the rider of offending vehicle was responsible for the accident. The Insurance Company except harping that there was contributory negligence did not produce any evidence in this regard. In the cited decision in the case of ***K.Nagapadma Sridevi*** (1 supra) the Division Bench of High Court of A.P. has clearly held that contributory negligence is a matter of proof but not of assumption. Hence, this argument of the appellant cannot be accepted.

b) The second argument of the appellant/Insurance Company is that rider of the offending motorcycle has no valid driving licence. This argument also does not hold water for the reason that the burden of proof of breach of terms of policy lies on the Insurance Company and except filing Ex.B2—copy of notice said to be issued to the owner of the crime vehicle to produce the driving licence particulars and Ex.B3—postal receipt, the appellant has not produced the postal acknowledgement in proof of serving of notice to the owner. So, no adverse inference can be drawn against the owner of crime vehicle for not producing licence particulars. Even assuming for a moment that driver had no driving licence, still it is not sufficient to exonerate the Insurance Company in view of ratio laid down in ***National Insurance Co. Ltd.*** *v**s.*** ***Swaran Singh and others***[5] wherein it was held that Insurance Company in order to succeed in its defence pleas touching the driving licence issues must:

> *Firstly establish 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 vehicle by a duly licensed driver or one who was not disqualified to driving at the relevant time.*
>
> *Secondly, the breach which was committed by the insured was so fundamental as is found to have contributed to the cause of the accident.*
>
> *Thirdly, even upon establishing the above conditions by the Insurance Company, the Tribunal can direct the insurer to pay and recover compensation amount from the insured.*

In the instant case also by virtue of Ex.B2—notice even if an adverse inference is drawn that driver of the offending vehicle had no valid driving licence, still the Insurance Company cannot be exonerated from its liability because it has not established that the owner has consciously and deliberately committed the breach of terms of the policy. So, the second argument of the appellant cannot be accepted.

9) The third argument of the appellant/Insurance Company is with regard to procedural violation of Second Schedule. In this case the Tribunal took annual income of the deceased as Rs.50,000/- and computed compensation under Second Schedule. However, such action of the Tribunal cannot be found fault with in view of observation of Apex Court in ***Sarla Verma***'s case (2 supra). It reads thus:

> *17. The Motor Vehicle Act, 1988 was amended by Act 54 of 1994, inter alia inserting Section 163A and the Second Schedule with effect from 14.11.1994. Section 163A of the MV Act contains a special provision as to payment of compensation on structured formula basis, as indicated in the Second Schedule to the Act. The Second Schedule contains a Table prescribing the compensation to be awarded with reference to the age and income of the deceased. It specifies the amount of compensation to be awarded with reference to the annual income range of Rs.3,000/- to Rs.40,000-/. It does not specify the quantum of compensation in case the annual income of the deceased is more than Rs.40,000/-. But it provides the multiplier to be applied with reference to the age of the deceased. The table starts with a multiplier of 15, goes upto 18, and then steadily comes down to 5. It also provides the standard deduction as one-third on account of personal living expenses of the deceased. Therefore, where the application is under Section 163A of the Act, it*

is possible to calculate the compensation on the structured formula basis, even where compensation is not specified with reference to the annual income of the deceased, or is more than Rs.40,000/-, by applying the formula : (2/3 x AI x M), that is two-thirds of the annual income multiplied by the multiplier applicable to the age of the deceased would be the compensation."

Hence, as per the above observation compensation can still be determined under Second Schedule even if the annual income exceeds Rs.40,000/-. So, none of the points raised by the appellant holds merit.

a) Then cross-objections are concerned, in Ex.A2—inquest report which was prepared within short time after the death of deceased, his occupation was mentioned as labour contractor. Thereby his occupation can be believed. His income is concerned, however there is no cogent evidence. So, going by Ex.A7—ration card the Tribunal accepted his annual income as Rs.50,000/-. I see no irregularity in it. However, following the dictum of Apex Court in ***Rajesh'***s case (3 supra) 15% is to be added towards future prospectus whereby the annual income of the deceased comes to Rs.57,500/-. After deducting 1/3rd the net annual contribution to the family comes to Rs.38,333/- (Rs.57,500/- x 2/3) rounded to Rs.**38,000**/- Multiplying the said amount with multiplier '**11**' the loss of dependency comes to Rs.**4,18,000**/- (Rs.38,000/- x 11).

b) Then, loss of consortium is concerned, as rightly argued the Tribunal has not awarded compensation in that regard separately. Hence, considering it and also the fact that deceased died at his middle age the first claimant is awarded Rs.**25,000**/- towards loss of consortium.

c) Then, considering that compensation for funeral expenses is too low, the same is enhanced to Rs.**25,000**/- following the decision reported in ***Rajesh***'s case (3 supra).

d) Then, for loss of love and affection, the claimants 2 to 4 are awarded Rs.**15,000**/-

Thus, the total compensation payable to the claimants is detailed as below:

Loss of dependency	Rs. 4,18,000-00
Loss of consortium	Rs. 25,000-00
Funeral expenses	Rs. 25,000-00
Loss of love and affection	Rs. 15,000-00
Transportation charges	Rs. 1,000-00
	Rs. 4,84,000-00

Thus, compensation is enhanced by Rs.**1,15,000**/- (Rs.4,84,000/- minus Rs.3,69,000/-).

e) Then, rate of interest is concerned, in the cited decision in the case of ***Yerramma*** (3 supra) the Apex Court awarded interest @ 9% per annum. It observed:

> *"17. As regards to awarding of interest on the compensation, the courts below have erred in awarding only 6% interest p.a. on the compensation awarded instead of 9% p.a. by applying the decision of this Court in* ***Municipal Corporation of Delhi*** *v.* ***Association of Victims of Uphaar Tragedy*** *MANU/SC/1255/2011 : (2011) 14 SCC 481. Therefore, we have to award the interest @ 9% p.a. on the compensation determined in this appeal."*

The said rate is followed.

10) In the result, Appeal and Cross Objections are disposed of and ordered as follows:

1. MACMA No.957 of 2009 filed by the Insurance Company is dismissed.

2. Cross Objections (SR) No.16683 of 2009 filed by the claimants are allowed and compensation is enhanced by Rs.**1,15,000**/- with proportionate costs and interest @ 7.5% per annum from the date of OP till the date of filing appeal and @ 9% per annum thereafter till realization.

3. The respondents 1 and 2 in the OP 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.

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

U. DURGA PRASAD RAO, J

Date: 24.03.2015

Note: L.R Copy to be marked: Yes / No

Murthy

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[1] 2001 (6) ALD 844 (DB)

[2] 2009 ACJ 1298 (SC) (MANU/SC/0606/2009)

[3] 2013 ACJ 1403 (SC)

[4] 2014 ACJ 3161 (SC)

[5] AIR 2004 SC 1531