

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

M.A.C.M.A. No. 319 of 2009

Between:

M/s. New India Assurance Company Limited rep. by
its Divisional Manager, Secunderabad Appellant

And

Rabiya Begum and others Respondents

DATE OF JUDGMENT PRONOUNCED: **26.10.2015**

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 HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

+ MACMA No.319 of 2009

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Between:

M/s. New India Assurance Company Limited rep. by
its Divisional Manager, Secunderabad Appellant

And

Rabiya Begum and others Respondents

! Counsel for Appellant : Sri B.Naresh

^ Counsel for Respondents 1 to 6 : Sri P.Sridhar Reddy

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> Head Note:

? Cases referred:

1 2008 (5) ALD 288 (DB)

2 2006 (5)ALD 11

3 1998 ACJ 1404 (Karnataka)

4 2008 (1) ALD 117 (SC) = 2007 ACJ 1934 (SC)

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A. No.319 of 2009

JUDGMENT:

Aggrieved by the Award dated 24.03.2008 in MVOP No.293 of 2006 passed by the Chairman, M.A.C.T-cum- I Additional Chief Judge, City Civil Court, Secunderabad (for short “the Tribunal”), the 2nd respondent/New India Assurance Company preferred the instant appeal.

2) The factual matrix of the case is thus:

a) On 20.02.2006 at about 4.00 pm when the deceased—Mohd. Muneeruddin was proceeding in a jeep bearing No. ADY 1064 as a passenger along with others from Adikicherla to Hyderabad on Chevella-Hyderabad road and when the vehicle reached near Appareddyguda gate at Moinabad Mandal, the jeep driver drove the same in a rash and negligent manner and thereby the jeep turned turtle causing instantaneous death of deceased. It is averred that jeep driver was responsible for accident and due to the sudden demise of deceased, the claimants became destitutes. On these pleas the claimants who are wife and children of the deceased, filed M.V.O.P.No.293 of 2006 under Section 166 of Motor Vehicles Act, 1988 (for short “M.V. Act”) against respondent Nos. 1 and 2, who are the owner and insurer of the jeep and claimed Rs.5,00,000/- as compensation under different heads mentioned in OP.

b) R1/countered the petition averments and urged to put the claimants in strict proof of the same. He pleaded the jeep was insured

with R2—Insurance Company and it has to indemnify the liability of R1, if any. He contended that claim is highly excessive and exorbitant and thus prayed for dismissal of OP.

c) R2/Insurance Company denied all material averments and urged to put the claimants in strict proof of the same. R2 contended that the compensation claimed is excessive and thus prayed to dismiss the O.P.

d) During trial, PWs.1 and 2 were examined and Exs.A1 to A7 were marked on behalf of the claimants. On behalf of respondents, RW.1 was examined and Exs.B1 to B3 were marked.

e) The Tribunal, on appreciation of oral and documentary evidence, has awarded a sum of Rs.3,53,000/- with costs and interest at 7.5% p.a under different heads as follows:

Loss of dependency Rs.3,20,000-00

Loss of consortium Rs. 15,000-00

Loss of estate Rs. 15,000-00

Funeral expenses Rs. 2,000-00

Transport Charges Rs. 1,000-00

Total Rs.3,53,000-00

Hence, the appeal by the Insurance Company.

3) Heard arguments of Sri B.Naresh, learned counsel for appellant/Insurance Company and Sri P. Sridhar Reddy, learned counsel for respondents/claimant Nos.1 to 6. Though notice on R7 was served there is no appearance on his behalf. Hence treated as heard.

4) The parties in this appeal are referred to as they were arrayed before the lower Tribunal.

5) Learned counsel for appellant/Insurance Company impugned the award fastening liability on the Insurance Company on the main argument that the policy though was in force by the date of accident, still it was an Act policy issued treating the crime jeep as a private car and hence R1 was authorised to use it for his private purpose only but contrary to the terms of policy, he carried passengers including the deceased at the time of accident and thus the deceased and others travelled in the vehicle as passengers and since the policy was only an Act policy and no additional premium was paid to extend coverage to the passengers, the Insurance Company is not liable to pay compensation. He thus prayed to allow the appeal and exempt the Insurance Company from its liability. To buttress his argument that the Act policy will not cover the risk of passengers in a private vehicle, he relied upon the Division Bench Judgment of this High Court reported in ***Branch manager, United India Insurance Company Limited, Kamareddy v. Kondakotla Saroja***.

6) Per contra, opposing the appeal, learned counsel for respondents 1 to 6/claimants contended that the instant ground raised by the Insurance Company was not taken either in its counter or during evidence and therefore, the Insurance Company is not entitled to take the said plea for the first time in the appeal and on this ground the appeal is liable to be dismissed. Even otherwise, the said plea is not maintainable because the deceased and others though travelled in the jeep as passengers, they were inasmuch as third parties, even according to the admission made by RW1—Administrative Officer of the appellant/Insurance Company and Ex.B2—policy squarely covers the risk of third parties and therefore, the Insurance Company is liable to meet the claim. He relied upon the decision in ***Oriental Insurance Company Ltd. v. Nakirikanti Narendra Babu*** in support of his argument that the passenger in the vehicle was a third party.

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

“Whether the Tribunal was right in fastening liability on the Insurance Company?”

8 a) **POINT:** On perusal, the record shows that the Insurance Company has not taken a specific plea either in its counter or in the evidence as it took in the appeal. The plea mainly taken by Insurance Company before the Tribunal was that the seating capacity of the crime jeep was only 5 but it was overloaded with 16 passengers in violation of Rules under M.V.Act and therefore, Insurance Company was not liable for the claim. In that context, the Tribunal in paras-21 and 22 of its judgment observed that though as per Ex.B1—RC extract the seating capacity of the jeep was 5 persons + driver, still the Insurance Company failed to establish that the vehicle was overloaded with 16 persons at the relevant time of accident and hence the said plea can not be accepted and further, even as per the admission of RW1 the deceased was a third party in this case and except his claim there were no other claims filed in connection with accident and therefore, the Insurance Company cannot be exonerated from its liability. Thus, it manifests that the Insurance Company fought before the lower Tribunal altogether on a different contention.

b) Be that it may, considering that the plea now taken by the Insurance Company is a plea based on mixed question of fact and law, I am inclined to take up this plea for discussion.

c) On a perusal, Ex.B2—policy shows it is an Act policy issued treating the crime jeep as a private car. The schedule of the premium shows that premium was paid to cover the risk of third parties (TP), third party property damage (TPPD), compulsory PA to owner-cum-driver and WC to employee-I. As rightly contended by learned counsel for appellant the policy is only an Act policy and no extra premium is paid to extend coverage to the passengers in the vehicle. So, it is obvious the risk of the deceased will not be covered as a passenger. Now, it has to be seen whether the deceased can be treated as third party.

9) In ***N.Narendra Babu***'s case (2 supra) relied upon by the respondents/claimants, the facts are that the claimant while travelling in a private car got injured when the car dashed against the stationed lorry. In the claim made against owner and insurer of the car, the Insurance Company contended that since the vehicle was used for hire or reward instead of as a private car, the Insurance Company was not liable. Learned single Judge of this Court negated the said contention on two main grounds. Firstly, basing on Section 11 of terms of Ex.B1—policy which stipulates the Insurance Company is liable to third parties including the occupants carried in the motor car provided that such occupants are not carried for hire or reward and the Insurance Company is not liable in case such death or injury arises out of and in the course of employment of such person by the insured, the learned Judge held the claimant has neither hired the car nor paid any reward and he was also not employed by the insured and therefore, his risk was covered. Secondly, on the ground that the claimant was a third party and the policy invariably covers the risk of third party. To treat the claimant as a third party, the learned relied upon the decision of High Court of Karnataka in ***National Insurance Company Limited v. Rasheeda*** wherein the learned Judge of Karnataka High court interpreted the word '*any person*' employed in Section 147 to include a traveler in a private vehicle also apart from third party.

a) On the strength of above decision, learned counsel for respondents vehemently argued that since the passenger in a private car can be treated as third party by virtue of above decision, the deceased in the instant case also should be treated as third party and as Ex.B2—policy invariably covers the risk of third party, the Insurance Company cannot now contend that deceased was not a third party. The above contention cannot be accepted in view of subsequent rulings of Division Bench of this High court and also Honourable Apex Court on the point in issue.

10) In **Kondakotla Saroja's** case (1 supra) relied upon by the appellant/Insurance Company the deceased travelled in a jeep met with accident and died when the jeep turned turtle on the way. In the resultant claim, the Insurance Company took the plea that policy issued was Act policy and vehicle was hired by the insured to Eenadu daily newspaper against the policy conditions and further, the deceased in the said vehicle travelled as an unauthorized passenger (fare paid passenger) in violation of terms of policy and hence, the Insurance Company was not liable. Thus, the question before the Division Bench was whether Insurance Company was liable to pay compensation for the passenger who travelled in the jeep which was covered by Act policy.

a) In that context, the Division Bench examined Ex.A5—policy and found that it was an Act only policy and columns “*additional risks if any covered*” and “*special conditions if any*” were kept blank indicating that no extra premium was paid to cover the passengers travelled in the jeep and accordingly exonerated the Insurance Company. In that process the Division Bench relied upon the decision of Apex Court in **Yellwwa v. National Insurance Company Limited** to come to the conclusion that passengers in the vehicles are not third parties.

11) In **Yellwwa's** case (4 supra) the Apex Court after referring several judgments held thus:

“24. The recent decisions of this Court are authorities for the proposition that the insurance company would not be liable in cases where passengers of a vehicles are not third parties.”

a) It must be noted that before Division Bench the claimants relied upon in **Nakirikanti Narendra Babu's** case (2 supra). However, in the light of judgment in **Yellwwa's** case (4 supra) and other decisions of Apex Court the Division Bench held that decision in **Narendra Babu's** case (2 supra) cannot be taken into consideration.

b) Therefore, it is clear that the risk of gratuitous or fare paid passenger in a private vehicle will not be covered under Act policy

unless extra premium is paid. In the instant case, the policy is Act policy and no extra premium was paid to extend coverage to the deceased who was the passenger but not third party. Hence, the Insurance Company has to be exempted from its liability. However, considering the fact that appellant/Insurance Company raises the instant contention in the appeal for the first time and also that the dependents of the deceased are large in number and it will be difficult for them to realize the compensation from the owner, it is considered apposite to direct the Insurance Company to pay compensation and recover the same from the owner.

12) In the result, this MACMA is allowed and the appellant/Insurance Company is directed to pay compensation and recover the same from the insured/owner of the vehicle. No costs in the appeal.

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

U.DURGA PRASAD RAO, J

Date: 26.10.2015

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