HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

MACMA No.2889 of 2015

ORDER :

The claimants are the appellants in the present un-numbered appeal, with an application to condone the delay of 97 days, impugning the order in O.P. No.358 of 2008 dated 10.05.2010 awarding compensation of Rs.3,80,072/- with interest at 7.5% p.a. by fixing liability on the 1st respondent owner of the tractor and trailer bearing No.AP 11 U 7610 and AAB 4551 and owner of auto bearing No.AP 09 FJ TR 5337 by exonerating the insurer of the auto i.e., the 3rd respondent on the ground of the driver of the auto of the 2nd respondent got only L.M.V non-transport licence instead of holding L.M.V. Transport licence.

2) It is in the claim filed under Section 166 of the Motor Vehicles Act for Rs.5,00,000/- by the mother and wife of the deceased Chandraiah, aged about 20 years as per Ex.A-7 post Mortem report of the accident dated 13.04.2008. The contentions in the grounds of appeal, while explaining the delay of 97 days due to financial difficulties they could not present the appeal, are that the Tribunal gravely erred in exonerating the 3rd respondent to indemnify the 2nd respondent-owner of the auto for the simple reason of the driver got only L.M.V non-transport for Tribunal which makes even no difference, hence to fix joint liability and the other

contention, the quantum of compensation arrived is utterly low to enhance. Undisputedly the tractor-trailer of 1st respondent is not with any insurance as on the date of accident.

3) Whereas, it is the contention of the learned counsel for the 3rd respondent-insurer, G.Ramachandra Rao, that the Tribunal is right in exonerating the insurer from liability for duty of the owner to verify the driver to have the effective driving licence while entrusting, as per the settled expressions of the apex Court and thereby for this Court while sitting in appeal merely because some other view possible, there is nothing to interfere, hence to dismiss the appeal and also the submission that even on the quantum arrived, there is nothing to interfere. It is also the contest of the insurer that the contributory negligence depends upon several factors including the size of the vehicle and the tractor-trailer is more than double in size to the auto while plying on the road, where the accident taken place thereby 50% contribution fixed by the Tribunal is unsustainable and requires modification to reduce, even otherwise.

4) Heard both sides and perused the material on record. Delay of 97 days in filing the appeal is condoned subject to condition of the petitioners not entitled the interest on the enhanced amount, if any, only from today. The fact that there is contribution of both the vehicles therefrom fixed, it is the settled and that the contributory negligence depends upon several factors as to the condition of the road, size of the

road, where the accident allegedly taken place and manner of the damage caused to the respective two vehicles with reference to the M.V.I. Report and scene observation report, apart from size of the vehicle. Here, 50% contribution fixed by the Tribunal is without any basis, thereby it requires modification to fix 40% on the auto and 60% on the tractor-trailer of respective drivers including from the size of the vehicle apart from the perusal of the record shows main contribution on the tractor trailer.

5) From this, now liability of the insurer concerned, it is settled law particularly from the expression of ***National Insurance Company Limited Vs. Swaran Singh & Others***[1]***, Kusumlatha and others V. Satbir and Others***[2]***, S.Iyyappan Vs. United India Insurance Company***[3] that even the driver not having valid driving licence, once there is a policy covering the risk, insurer cannot avoid liability but for pay and recover. Hence, the exoneration of the insurer from liability in toto by the Tribunal is unsustainable to set aside and to fix liability to pay and recover with directions as laid down in ***Oriental Insurance Company Limited Vs. Nanjappan & Others***[4].

6) Now, coming to the quantum of compensation, the deceased was claiming as labourer at Saw Mill and earning an amount of Rs.6,000/- per month. The accident took place on 13.04.2008. Even as per **Latha Wadhwa vs. State of**

Bihar[5], in the absence of proof of earnings, minimum Rs.3,000/- per month has to be taken and the accident is seven years after the expression, even taken Rs.3,600/- per month and if 1/3rd deducted towards personal expenses, it comes to Rs.2,400/- per month. When it multiplied with 18 as the multiplier, it comes to Rs.5,18,400/- and apart from that the petitioners are entitled to Rs.1,35,000/- (towards loss of consortium, funereal expenses and loss of estate vide **Rajesh v. Rajbir Singh**[6]**)**, in total it comes to Rs.6,53,400/-, of which 40% liability i.e., Rs.2,61,360/- shall be on the 2nd respondent for the 3rd respondent insurer of the auto to indemnify for payment and recovering and remaining 60% i.e., Rs.3,92,040/- on the tractor-trailer owner.

7) Accordingly and in the result, the appeal is partly allowed by setting aside the award of the Tribunal exonerating the 3rd respondent-insurer of the 2nd respondent auto and by fixing liability to the extent of pay and recover and by enhancing the compensation to Rs.6,53,400/-, of which by apportioning the liability of the auto driver to an extent of 40% to indemnify by owner and insurer the respondent Nos.2 and 3 that comes to Rs.2,61,360/- and the remaining to the extent of 60% by the owner of the tractor and trailer vicariously by its driver's negligence that comes to Rs.3,92,040/- to recover by the claimants. The respondents shall deposit said amount within one month, failing which the claimant can execute and recover. It is made clear from the settled expressions of the

Apex Court in **United India Insurance Co. Ltd. V. Lehru**[7] & **Nanjappan** (supra) that the insurer is entitled, while depositing the amount payable, if not deposited or paid any amount so far to deposit in bank to approach the Tribunal to direct the RTA concerned not to register any transfer of the crime vehicle and to seek for attachment of the crime vehicle or other property of the insured as an assurance for execution and recovery in the same proceedings or under revenue recovery as per the MV Act, 1988 and also ask the Tribunal not to disburse the deposited amount to claimant (but for to invest in a bank) till such attachment order is made. However, after the same, the Tribunal shall not withhold the amount of the claimants, if there is any necessity to permit for any withdrawal but for to invest the balance in fixed deposit in a nationalized bank. Rest of the terms of the award of the Tribunal holds good. There is no order as to costs.

8) Miscellaneous petitions, if any pending in this appeal, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

30.12.2015
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[1] (2004) 3 SCC 297=2004-ACJ-1

[2] AIR 2011 SC 1234 = 2011 (2) SCJ 639

[3] (2013) 7 SCC 62

[4] (2004) 13 SCC 224=2004-SAR(civil)-290

[5] (2001) 8 SCC 197=AIR 2001 (SC) 3218

[6] 2013 ACJ 1403=(4)ALT-35(SC).

[7] JT-2003(2) SC 595 = 2003 ACJ 611