HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

M.A.C.M.A.No.403 of 2010

JUDGMENT:

The claimants, no other than parents, major unmarried sisters and major brother of the deceased-N.Hemanth Kumar, aged about 26 years or so as per Ex.A3-Post Mortem Report, maintained the appeal, impugning the award of the tribunal dated 03.12.2009 in O.P.No.906 of 2008 filed under Sections 140 and 163A of the Motor Vehicles Act (for short 'the Act') for a compensation of Rs.25,00,000/- for death of him on 12.10.2008 due to the alleged rash and negligent driving of the driver of the auto bearing No.AP 02 W 8355 of the 1st respondent insured with the 2nd respondent, from what the tribunal awarded of Rs.23,53,288/- with interest at 7.5%p.a., with contentions that said quantum as utterly low and instead of taking the earnings of the deceased at Rs.40,380/- p.m. taken a lesser sum and further that the exoneration of insurer is unsustainable.

2. Heard the learned counsel for the appellants/claimants and the learned counsel for the 2nd respondent and taken as heard the 1st respondent-owner of the vehicle, who even deposed as RW.1 before the tribunal served and failed to appear in the appeal. Perused the material on record.

2. The deceased along with his father and brother, who are claimants 1 and 5 were allegedly travelling in the auto and due to rash and negligent driving of the auto driver of the 1st respondent, the auto turned turtle, as a result, he was succumbed to the injuries. This is the sum and substance of the claim. PW.1, who is father of the deceased deposed by exhibiting Exs.A1 to A5, which are F.I.R, inquest report, Post Mortem certificate, M.V.I.Report, charge sheet and the other evidence covered by Exs.A6 to A8 are the appointment order, pay slip and service certificate of the deceased exhibited through PW.2 co-employee of the deceased in Hewlett Pacard Global Soft Limited, Bangalore, a software entity. On behalf of respondents, Ex.B1-cover note exhibited by the 1st respondent as RW.1. The 2nd respondent-insurer to the claim petition did not examine any witness.

3. So far as exoneration of the insurer is concerned, it is the contention of the learned counsel for the insurer that it is a fit case to be remanded to the lower Court with opportunity to the insurer to adduce any evidence by tracing any record to correlate the so called cover note. No additional evidence application is filed before this Court even the appeal is pending since 2010. The Court cannot lose sight of its duty of not to casually remand any matter by giving further life to

the litigation, unless there is a sufficient ground and justification. The contention of the insurer is that the cover note under Ex.B1 is a fake one and manipulated by the 1st respondent. There is no oath against oath much less to rebut said evidence of the 1st respondent-RW.1 with reference to Ex.B1 by the insurer. Nothing even could be elicited from the RW.1's cross examination. There from and for the reason of no any additional evidence application even filed, this Court feels no just cause to consider the request to remand the matter and give further life to the litigation for no worth purpose.

4. Now, coming to the liability of the insurer, once the 1st respondent as RW.1 came to the witness box and exhibited the Ex.R1 as the cover note duly obtained and the insurer has to issue a policy within statutory time after issuing of the cover note, in the facts of the case but for saying the cover note is not genuine, no documentary evidence filed by the insurer to show the series of the numericals mentioned in the cover note were not issued by the insurer. Having regard to the above and from the fact that the cover note was not cancelled by the insurer issuing any notice as contemplated by Section 64 (V) of the Insurance Act, if at all no premium was received. No doubt, the dealer of Sri Sai Automobiles to show

agent of them issued the cover note and that was the person represents the insurance company as its agent and the Automobile shop owner not even examined to substantiate further the evidence of the 1st respondent-RW.1. Thus, the tribunal instead of dismissing the claim against the insurer should have ordered the insurer to pay to the claimants and then to recover from insured if able to show in the execution petition to be filed before the tribunal that the cover note was not issued from their respective series of the cover notes.

5. Now coming to the other aspects, it is the appeal of the claimants. Among the five claimants, but for the parents, the three others are not dependants on the deceased as per the settled law. Now the claim mentioned as filed under Sections 140 and 163A of the Act. There is in fact a finding by the tribunal under Section 166 of the Act. The tribunal no doubt got the power to treat the claim either under Section 163-A or 166 of the Act even no option exercised by claimants before proceeding with trial, during trial as per the settled law. Once there is a finding of fault liability for all purposes it shows that the tribunal proceeded under Section 166 of the Act, that too a claim under Section 163-A cannot be maintained by mentioning the claim also under Section 140 of the Act from the very statutory bar from combined reading of

chapters 10 to 12 of the Act, 1988. Having regard to the above, once the tribunal taken the claim under Section 166 of the Act and proceeded to determine with a finding of the accident was the result of negligent driving of the auto driver and the factual matrix from the record including charge sheet, M.V.I.Report and Post Mortem Report show from the auto turned turtle, the deceased was succumbed to the injuries as one of the passengers of the auto and not from overloading even, much less to say any contribution of deceased there from. That finding thus no way requires interference.

6. Coming to the quantum, the age of the mother of the deceased is shown between 45 to 50 years and the multiplier that applicable is thus '13' as per Sarla Verma v. Delhi Transport Corporation[1].

7. Coming to the earnings of the deceased, no doubt the qualifications of the deceased were not filed, so also his date of birth proof. Only appointment order, pay slip and service certificate filed through PW.2, that can be taken in assessing the earnings of the deceased without considering any prospective increase as the very observation of the tribunal doubts the genuineness of the so called service

[1] 2009 ACJ 1298

certificate. However, the tribunal relied thereon. For the reasons, once the deceased was as relied by the tribunal shown drawing Rs.40,380/- as salary take home, it is not believable that he was paying income tax of Rs.391/- only as shown out of total deductions including the sum of Rs.2,486/- from Ex.A7-salary certificate shows net Rs.37,894/-. In fact, the accident was dated 12.10.2008. The salary certificate was for the month of September, 2008. Out of the net amount taken by the tribunal of Rs.37,894/-with income tax Rs.391/- at least 20% income tax deduction requires there from. If taken Rs.38,000/- p.m. and 20% income tax deduction taken there from, it comes to Rs.30,400/- and if half of the same is deducted towards personal expenses of the deceased, it comes to Rs.15,200/-p.m.. If the same is multiplied with '13', it comes to Rs.15,200/- p.m. x 12 x 13 = Rs.23,71,200/-. Apart from it, the claimants are entitled to Rs.35,000/- towards loss of estate and funeral expenses. In total it comes to Rs.24,06,200/-, rounded to Rs.24,06,000/- and what the tribunal awarded of Rs.23,53,288/-, thus requires so to enhance.

8. Accordingly, the appeal is partly allowed by enhancing the compensation from Rs.23,53,288/- to Rs.24,06,000/- with pay and recovery liability of the insurer if

the insurer is able to establish by filing execution petition before the tribunal showing there is no cover note issued by taking premium for the policy or the policy already cancelled by issuing any notice before the accident. No order as to costs.

9. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

Dr. B. SIVA SANKARA RAO, J

Date:06.12.2016
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