**HON'BLE SRI JUSTICE A. SHANKAR NARAYANA**

**M.A.C.M.A. No.31 OF 2009**

**JUDGMENT:**

Respondent No.2 - M/s. Bajaj Allianz General Insurance Company Limited in M.V.O.P. No.1005 of 2004, on the file of Chairman, Principal Motor Accident Claims Tribunal - cum - Principal District Judge, Warangal (for short 'the Tribunal'), aggrieved over the order and decree, dated 14-07-2008, whereby and where-under, an amount of Rs.7,97,321/- was granted as compensation with interest at 7.5% per annum, preferred the present appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act').

2. Respondent No.7 and the appellant herein, who are owner and insurer of an auto-rickshaw bearing registration No.AP 36V 7454, are respondent Nos.1 and 2, respectively, while respondent No.1 to 6 are the petitioners in MVOP before the Tribunal.

3. For the sake of convenience, the parties hereinafter referred to as they were arrayed in MVOP.

4. Originally, one Lonka Vijay Kumar, who is deceased petitioner No.1 for the injuries he sustained in a road accident on 08-04-2004 at about 10.00 p.m., on the main road leading to Palakurthy to Ghanpur, Warangal District, filed the claim petition

under Section 166 of the Act requesting to grant a compensation of Rs.8,00,000/-.

i) On 08-04-2004, he boarded an auto-rickshaw bearing registration No.AP 36V 7454 at Palakurthy to go to Ghanpur Station village and at about 10.00 p.m. since the auto-rickshaw driver drove it in a rash and negligent manner, lost control over the auto-rickshaw having crossed the village Gudur, it turned upside down resulting in traumatic cervical cord, traumatic compression of C5 and C6 with retro-pulsion and posterior displacement of C6 causing cord compression with cord contusion and cord edema at C2 to C7 level, wedging of C6 and C7 vertebral body and fracture of anterior and posterior paraspinal collection and other injuries all over his body. He was initially taken to Jaya Hospital, Hanamkonda. He was treated as in-patient till 09-04-2004. On Neurosurgeon's advice, he was shifted to NIMS, Hyderabad, where he had undergone treatment as in-patient from 10-04-2004 to 24-04-2004. After discharge, he was attending to follow up treatment in NIMS as an out-patient under Dr. G. Madhusudan Prasad, and Neuro Care Centre at Hanamkonda and Sri Venkateshwara Diagnostics, Sri Sai Clinic, Hanamkonda and Life Line Hospitals, Hanamkonda, where he was treated as in-patient from 20-08-2004 to 23-08-2004, and again he was treated as in-patient from 06-09-2004 to 11-10-2004 in MGM Hospital, Warangal and thus, spent more than Rs.2,00,000/-. Even on the date of filing the claim petition, he was completely bed-ridden and was even unable to move to attend to nature calls. He was suffering with continuous disability and the Medical Board, M.G.M. Hospital issued a certificate assessing the disability at 80%.

ii) Claiming that he was earning not less than Rs.8,000/- per month as Video and Photographer, aged 25 years on the date of accident, with wife and children, besides his parents as dependants and that he himself became a dependant on account of the injuries sustained in the accident on them and suffering mental agony. He thus, sought the aforesaid compensation.

5. During pendency of the claim petition, petitioner No.1 died. Therefore, his legal representatives came on record as petitioner Nos.2 to 6 as per the orders in I.A. No.2329 of 2005, dated 03-02-2006. Even, consequential amendments were also incorporated in the body of the main petition stating that death of petitioner No.1 did occur on account of non-healing of the injuries he sustained in the said accident.

6. Respondent No.1, owner of the auto-rickshaw, remained *ex parte*.

7. Respondent No.2 - Insurer filed written statement opposing the claim in entirety. After the petition was amended, additional written statement was filed reiterating the defence already projected in the original written statement attributing collusion between the petitioner and owner of the vehicle throwing burden on the petitioners

to prove that the driver of the auto at the relevant time was possessing valid and effective driving license to drive the auto and reserving its right to seek protection under sections 147, 149 and 170 of the Act and Section 64 (v) (B) of the Insurance Act, 1938, sought to dismiss the claim petition against it.

8. Basing on the pleadings originally set out prior to the amended petition being filed, the Tribunal framed the following three (3) issues:

" 1) Whether the accident is due to rash and negligent driving of the driver of Auto bearing No.AP36V 7454?

2) Whether the petitioners entitled to claim compensation, if so, to what amount and from whom?

3) To what relief? "

9. During inquiry, petitioner No.2, wife of the deceased - petitioner No.1, examined herself as PW.1 and the doctors as PWs.2 to 4 and two more witnesses as PWs.5 and 6, respectively, and marked Exs.A-1 to A-13, besides getting Exs.X-1 to X-5 marked through the Medical Officers from Jaya Hospitals, Hanamkonda and NIMS Hospital. On behalf of respondent No.2 - Insurer, RWs.1 and 2, who were Junior Assistant in RTA Office and Officer of local branch were examined and Exs.B-1 to B-4 were marked.

10. The Tribunal, having dealt with elaborately the rival contentions advanced by the learned counsel on either side, initially, dealt with the liability in connection with violation of terms and

conditions of the policy as the driver of the auto-rickshaw was not possessing valid and effective driving license to drive the auto-rickshaw and relying on a ruling of the Hon'ble Supreme Court in **National Insurance Company Limited v. Swaran Singh**[1], did not agree with the stand of the Insurance Company and held that respondent Nos.1 and 2are jointly and severally liable to pay compensation to the petitioners.

i) Concerning the stand that the death of the deceased took place when the proceedings in the claim petition were pending, basing on the post-mortem examination report, rejected the stand of the insurer holding that the death of the deceased was due to the injuries he sustained in the said accident though, the death had taken place one year four months after taking place of the accident, and thereby worked out the compensation fixing earnings of the deceased, taking his age and applying relevant multiplier. In the said process, the Tribunal appraised the evidence of Medical Officers and awarded Rs.2,57,321/- towards medical expenses basing on the documentary evidence as well as evidence of PWs.2 and 3.

ii) Turning to the earnings of the deceased, basing on the evidence of PW.6, taken the monthly earnings at Rs.4,000/- and age of the deceased as 25 years, applied multiplier factor '15' and capitalized 2/3$^{rd}$ of his earnings or Rs.36,000/- per annum as the

[1]. 2004 ACJ 1 (SC)

contribution to the family and worked out Rs.5,40,000/- towards loss of dependency. The Tribunal borrowed the multiplier factor from the second schedule to Section 163-A of the Act though, referred to the decision of the Hon'ble Supreme Court in **General Manager, KSRTC v. Mr. Susamma Thomas**[2], **UPSRTC v. Trilokchand**[3], and even the decision of this Court rendered by a Single Judge in **Bhagwandas v. Mohd. Arif**[4]. The Tribunal has also granted Rs.2,000/- towards funeral expenses, Rs.2,000/- towards loss of estate and Rs.2,500/- towards loss of consortium in terms of second schedule to Section 163-A of the Act. Thus, the Tribunal has granted a total amount of Rs.7,97,321/- with interest at 7.5% per annum by apportioning the amount amongst petitioner Nos.2 to 6.

11. Aggrieved over the aforesaid order and decree, the present appeal is preferred by the insurer contending in the grounds that:

i) The driver of the auto-rickshaw was not having valid subsisting license to drive passenger auto-rickshaw and having noticed the same, the Tribunal ought not to have mulcted liability on the insurer.

ii) Without any legally acceptable evidence on record, the Tribunal went wrong in fixing the monthly earnings at Rs.4,000/- and taking Rs.3,000/- towards contribution to the family

2. AIR 1994 SC 1631
3. (1996) 4 SCC 362
4. 1987 ACJ 1052

iii) The Tribunal somehow overlooked the fact that the death of the deceased had occurred more than one year after the accident and failed to consider that there was no nexus to the accident and cause of the death.

Hence sought to set aside the award and exonerate its liability from paying the decreetal amount.

12. Heard Sri T. Mahender Rao, learned counsel for the appellant - insurer, and Sri M. Ajay Kumar, learned counsel for respondent Nos.2 to 6 - petitioners. Though, notice was served on respondent No.7, owner of the vehicle, none appears for him.

13. The ground agitated by the insurer that no liability ought to have fixed on the insurer as the auto-rickshaw driver did not possess valid and effective driving license to drive a transport passenger auto is concerned, it is well settled that insurer cannot get over the initial liability to pay and recover the compensation from the owner in view of the law declared by the Hon'ble Supreme Court in **S. Iyyapan v. United India Insurance Company Limited and another**[5] in paragraph Nos.16 to 19 thus:

> "16. In the case of ***National Insurance Co. Ltd.*** *v.* ***Annappa Irappa Nesaria alias Nesaragi and Ors.*** [2008 (3) SCC 464], the vehicle involved in the accident was a matador having a goods carriage permit and was insured with the insurance company. An issue was raised

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5. AIR 2013 (SC) 2262

that the driver of the vehicle did not possess an effective driving licence to drive a transport vehicle. The Tribunal held that the driver was having a valid driving licence and allowed the claim. In appeal filed by the insurance company, the High Court dismissed the appeal holding that the claimants are third parties and even on the ground that there is violation of terms and conditions of the policy the insurance company cannot be permitted to contend that it has no liability. This Court after considering the relevant provisions of the Act and definition and meaning of light goods carriage, light motor vehicles, heavy goods vehicles, finally came to conclusion that the driver, who was holding the licence duly granted to drive light motor vehicle, was entitled to drive the light passenger carriage vehicle, namely, the matador. This Court observed as under:

> 20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorized to drive a light goods vehicle as well.

17. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it

obligatory that no motor vehicle shall be used unless a third party insurance is in force.

18. Reading the provisions of Sections 146 and 147 of the Motor Vehicles Act, it is evidently clear that in certain circumstances the insurer's right is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a person who was not having a duly granted licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy.

19. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay

> compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment is, therefore, liable to be set aside."

However, the Hon'ble Supreme Court while setting aside the judgment of the High Court, held that the insurer is liable to pay compensation so awarded to the dependants of the victim of the fatal accident.

i) Therefore, to the extent of absolute joint and several liability fastened by the Tribunal requires modification to that of initial liability to pay the compensation and recover the same from the owner. Accordingly, the finding recorded by the Tribunal to that extent is modified, directing the appellant - insurer, which is respondent No.2 in MVOP to initially pay the compensation amount that would be arrived at on analyzing the other two contentions raised in the present appeal.

14. So far as the contention of the learned counsel for the appellant that the Tribunal faulted in fixing the monthly earnings at Rs.4,000/- is concerned, there is convincing evidence to show that the deceased was even Video and Photographer and evidence of PW.6 would prove the same, which the Tribunal has referred to elaborately. Nothing is brought out in the cross-examination of PWs.1 and 6 to hold that the deceased was not a professional. Therefore, that submission has no merit.

15. Touching the third submission that death of the deceased occurred during pendency of the claim petition proceedings, the learned counsel for the appellant places reliance on rulings in **Sridevi (deceased) throughLRs. V. Mastak Ahamad and others**[6] rendered by a Division Bench of Karnataka High Court at Bangalore for the proposition that an appeal by injured claimant for enhancement of compensation for pain and suffering, loss of amenities etc., abates on the death of the claimant. He places reliance on yet another decision of a learned Single Judge of Delhi High Court in **V. Mepherson and another v. Shiv Charan Singh and others**[7] to the effect that claim for enhancement of general damages for pain and suffering abates after the death of the claimant, but claim on account of expenses on medicine, special diet, conveyance etc. which relate to loss to estate would not abate; rendered following the decisions in **Joti Ram v. Chaman Lal**[8] and **Sampati Lal v. Hari Singh**[9]. Even he places reliance on a decision of a learned Single Judge of this Court in **S. Vykuntam (died) per L.Rs. v. G. Narayana and others**[10] to the same effect. To the same effect is also the decision in **United India Insurance Company Limited v. G. Kishen Rao and others**[11]. The learned counsel also places reliance on the judgment of Gujarat High Court at Ahmedabad in **Madhuben Maheshbhai Patel since died**

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6. 2001 ACJ 479
7. 1998 ACJ 601
8. 1984 ACJ 645 (P&H)
9. 1985 ACJ 539 (Rajasthan)
10. 2008 ACJ 40
11. 2004 (1) ALD 626

**through heir v. Joseph Francis Mewan**[12] answering a reference on the following question:

> "Whether the view taken by the learned Single Judges of this Court in the decisions referred to above as well as decision of the Division Bench in the case of Surpal Singh L. Gohil v. R.M. Savalia (supra), lay down the correct proposition of law regarding applicability of section 306 of the Succession Act to a claim-application under section 166 of the MV Act where the claim for compensation is filed for the personal injuries caused to the claimant and during the pendency of the petition, he died a natural death."

held in paragraph Nos.9 and 10 thus:

> "…….
> 12. The maxim 'actio personalis moritur cum persona' relates only to the personal or bodily injuries and not to the loss caused to the estate of the deceased by the tortfeasor. In this way, this maxim stands considerably abrogated or modified by the provisions of Section 306 of the Succession Act. Section 306 clearly lays down that all demands whatsoever and all rights to prosecute or defend in an action or special proceeding existing in favour of or against a person at the time of his death survive except causes of action for defamation etc. which come to an end with the death of the injured. The loss to the estate is, thus not covered by the exception contained in section 306 of the Succession Act. A few authorities on the point may be noticed. In Kongara Narayanamma v. Uppala China Simhachalam, 1975 ACJ 448 (AP), it was observed:
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> > "21-AIn making a claim, a claimant could claim loss to his property of whatever description caused by the accident. There is no warrant for holding that the cause of action in respect of that loss would not survive to the legal representatives."

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[12]. First Appeal No.1528 of 2009, dt.14-11-2014

In Thailammai v. A.V. Mallayya Pillai 1991 ACJ 185 (Mad), it was held that the cause of action in respect of damages to the estate of the deceased survives and passes over to his legal representatives. In Joti Ram v. Chamanlal 1984 ACJ 645 (P & H) = AIR 198s P & H 2 a Division Bench of the Punjab & Haryana High Court took the view that the right to sue survives to the legal representatives of the deceased - injured in respect of claim on account of the loss to the estate. On a careful consideration, I find myself in complete agreement with the views expressed in the above two cases. I am, therefore, of the opinion that if the claim under the Act also relates to the estate of the deceased, the action survives on the death of the claimant and passes over to his legal representatives.

10.00. Considering the aforesaid decision of the the Division Bench of this Court in the case of Surpal Singh Ladhubha Gohil (supra); decisions of the learned Single Judge of this Court in the case of Jenabai Widow of Abdul Karim Musa (supra) and in the case of Amrishkumar Vinodbhai (supra); and aforesaid two decisions of the learned Single Judge of the Rajasthan High Court, we are of the opinion that maxim "actio personalis moritur cum persona" on which section 306 of the Indian Evidence Act is based cannot have an applicability in all actions even in an case of personal injuries where damages flows from the head or under the head of loss to the estate. Therefore, even after the death of the injured claimant, claim petition does not abate and right to sue survive to his heirs and legal representatives in so far as loss to the estate is concerned, which would include personal expenses incurred on the treatment and other claim related to loss to the estate. Under the circumstances, the issue referred to the Division Bench is answered accordingly. Consequently, it is held that no error has been committed by the learned tribunal in permitting the heirs to be brought on record of the claim petition and permitting the heirs of the injured claimant

> who died subsequently to proceed further with the claim petition. However, the claim petition and even appeal for enhancement would be confine to the claim for the loss to the estate as observed hereinabove.
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> Now, the matter will be placed before the learned Single Judge to proceed further with the appeal and to consider the claim accordingly in accordance with law and on merits and to the aforesaid extent, as observed hereinabove."

The fact-situation occurring in the present case stands slightly on a different footing. It is true, death of petitioner No.1, who originally laid the claim petition for the injuries he sustained, occurred during the pendency of the claim petition proceedings, but, there is cogent and clinching evidence through Medical Officers examined as PWs.2 to 4 to indicate that the proximate cause of death must be invariably due to the injuries sustained by him in the accident. This aspect was elaborately dealt with by the Tribunal in paragraph Nos.19 and 20 of its order. The very nature of injuries sustained by the deceased petitioner No.1, when examined in the light of evidence of PWs.2 to 4, there is no escape to arrive at the conclusion that the injuries he sustained rendered him disabled sticking to bed without any mobility at all and, more particularly, evidence of PW.4 clinching the issue under debate herein. Even, in his cross-examination, PW.4 sticks to his assertion that injuries sustained by the deceased petitioner No.1 can sometime be life threatening. It is not the case of the insurer that the deceased petitioner No.1 on discharge from the hospital after the first spell became normal and was able to pursue his ordinary daily activities. In fact, the evidence would clinchingly establish that the deceased petitioner No.1 never became alright and he had to undergo surgical interventions in various hospitals referred to hereinabove and ultimately meeting the death on 23-08-2005. The disability certificate (Ex.A-12) issued by Medical Board which contains the photograph of the deceased while he was alive gives a definite indication that he was bed-ridden completely. The second indicator is, post-mortem examination report marked as Ex.A-5; the opinion tendered by the Medical Officer again would clinch the issue. His opinion as to the cause of death recorded as Spinal injury and its complications and died in Lifeline Hospital. The Tribunal while considering the typical situation occurring in the instant case, recorded a positive finding that the cause of death of deceased petitioner No.1 was due to the injuries sustained by him during accident. Since the said finding is well-reasoned arrived at basing on appreciation of evidence, and nothing is shown by the appellant herein that, that finding recorded by the Tribunal is utterly perverse, certainly, the said finding cannot be upset. Therefore, no interference is warranted.

16. Viewed from yet another angle, it is difficult to hold that there is merit in the submission of the learned counsel for the appellant, that being, when the amendment was introduced not only bringing the legal heirs of the deceased petitioner No.1, but also

making the relevant amendments claiming compensation for his death showing that cause of death was nothing but injuries he received in the accident and the order passed by the Tribunal allowing the amendment to introduce relevant facts in the body of the petition, the appellant herein has not chosen to challenge it and maintained silence. This circumstance also stands adverse to the contentions now raised in the present appeal.

17. Thus, to conclude, in view of the foregoing discussion, the order and decree under challenge are modified only to the extent of removing the absolute joint and several liability mulcted on the appellant - insurer - respondent No.2 in MVOP replacing it with initial liability of making payment of compensation awarded by the Tribunal and recover the same from owner of the auto-rickshaw, respondent No.1 in MVOP. In all other respects, the order and decree passed by the Tribunal is confirmed.

18. Accordingly, the appeal is allowed in part to the extent as indicated in the above. No order as to costs.

As a sequel thereto, miscellaneous applications, if any, pending in the appeal, stand disposed of.

**A. SHANKAR NARAYANA, J**

**December 09, 2016.**
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