HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

M.A.C.M.A. No.1798 OF 2009

JUDGMENT:

The National Insurance Company Limited, represented by its Divisional Manager, who is respondent No.2 in M.V.O.P. No.85 of 2007 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-District Judge, Guntur (for short, 'the Tribunal'), aggrieved over the order and decree dated 21.04.2008, preferred the instant appeal under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act') mainly on the ground that the deceased in this case died on account of his own fault or own negligence in hitting the stationed lorry from behind while driving his auto-rickshaw and, therefore, the appellant-insurer cannot be made liable to pay the compensation.

2. Appellant herein, who is the insurer of the crime vehicle, is respondent No.2, while respondent Nos.1 to 4 herein, who are the wife, children and mother of one Macherla Subba Rao (deceased), are the petitioners and respondent No.5 herein, who is owner of the accident vehicle, is respondent No.1 in the original petition before the Tribunal.

3. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the Tribunal in the original petition.

4. The petitioners, being the legal heirs of the deceased laid claim for award of compensation of Rs.3,00,000/- by laying a claim under Section 163-A of the Act. The deceased was 25 years old earning Rs.4,000/- per month as driver of the auto-rickshaw belonging to respondent No.1, which is involved in the instant accident.

5. Their case is that on 27.12.2004, while the deceased was driving the auto-rickshaw bearing registration No.AP 7T 2179 from bus stand of Guntur towards Stambalagaruvu at about 1-30 a.m. (early hours) near third line of Rajendra Nagar, he hit a stationed lorry from behind, due to which, the auto-rickshaw was badly damaged and he sustained grievous injuries, and while undergoing treatment in the hospital, he succumbed to injuries. Therefore, claim was laid against respondent Nos.1 and 2, who are owner and insurer of the said auto-rickshaw.

6. Both the respondents have filed separate counters. Respondent No.1 pleaded that since the vehicle was insured with respondent No.2, he is not liable to pay the compensation and, therefore, sought to dismiss the claim against him.

7. Respondent No.2-insurer raised various pleas requiring the petitioners to prove the material allegations mentioned in the claim petition.

8. Basing on the aforesaid pleadings, the following issues were framed about the responsibility for the accident:

> "1) Whether the deceased died in the accident caused due to rash and negligent driving of the auto bearing No.AP 7T 2179 by its driver?
>
> 2) Whether the petitioners are entitled for compensation? If so, what would be the just amount of compensation that the petitioners would be entitled to and against whom?
>
> 3) To what relief?"

9. During enquiry, petitioner No.1 herself examined as P.W.1 besides examining one Atluri Babu Rao as P.W.2 and marked Exs.A.1 to A.3; and on behalf of respondents, one M.V.S.Chalapathi Rao, Local Branch Manager of the insurer examined as R.W.1 and one Ch.Sunil Kumar, an Officer in RTA Office of Guntur was examined as R.W.2 to prove that the deceased was given licence to drive non-transport auto-rickshaw and he was not eligible to drive passengers auto-rickshaw and marked Exs.B.1 and B.2, which are attested copy of insurance policy and driving licence.

10. The Tribunal, observing that the evidence available on record would reflect that the accident was purely due to the fault of the deceased himself, who drove the auto-rickshaw in a rash and

negligent manner and hit the stationed lorry, held issue No.1 against the petitioners.

11. On issue No.2, the Tribunal as per the earnings of the deceased at Rs.1,800/- per month or Rs.21,600/- per annum, deducted 1/3rd towards personal living expenses of the deceased and contribution to the family at Rs.14,400/- and capitalized with multiplier factor '17' as per the Schedule-II to Section 163-A of the Act, since the deceased was 23 years old, and arrived at Rs.2,44,800/- towards loss of dependency. The Tribunal has also awarded Rs.15,000/- towards loss of consortium and Rs.5,000/- towards transport and funeral expenses and Rs.15,000/- towards loss of estate and, thus, arrived at a total compensation of Rs.2,79,800/-, but rounded it off to Rs.2,80,000/- and awarded the same with interest at 7% per annum.

12. The Tribunal, taking up the evidence of R.Ws.1 and 2 and the contents of Ex.B.2, held that it makes no difference whether the deceased holds licence to drive non-transport vehicle or passengers vehicle and, ultimately, held that both the respondents are jointly and severally liable to pay the compensation. Thus, on issue No.3, a compensation of Rs.2,80,000/- was granted with interest at 7% by apportioning it among the petitioners.

13. It is the aforesaid order and decree that are under challenge in the instant appeal mainly contending in the grounds that

despite recording definite finding by the Tribunal that the accident had occurred only due to the own negligence of the deceased and the Tribunal was not right in ordering the insurer to pay the compensation initially and recover the same from the insurer later without assigning any reasons at all. Hence, sought to set aside the award and decree under challenge passed by the Tribunal.

14. Heard Sri K. Sita Ram, learned Standing Counsel for the appellant-insurer. On behalf of respondent Nos.1 to 4 herein/ claimants, even on behalf of respondent No.5 herein-owner of the accident vehicle, none appears, though, service was completed on them.

15. The fact-situation is not disputed. The own negligence resulting in the death of the deceased, which finding recorded by the Tribunal is also not challenged by preferring any appeal by the claimants. The only submission of the learned counsel for the appellant-insurer is that when a definite finding is recorded by the Tribunal that the accident did occur on account of the negligence of the deceased himself, the Tribunal was not right in mulcting liability on the insurer. The learned Standing Counsel for the appellant-insurer places reliance on the ruling of the Hon'ble Supreme Court in **Oriental Insurance Company Limited v. Meena Variyal and others**[1] and the decision of the High Court of Karnataka in **Appaji**

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[1] (2007) 5 SCC 428

(since deceased) and another v. M. Krishna and another[2], where the claim was laid under Section 163-A of the Act.

16. Learned counsel for petitioners would contend that since the lorry was wrongly stationed and there was negligence on the part of the driver of the lorry and no negligence can be attributed to the deceased in taking place of the accident. He supports the order and decree under challenge passed by the Tribunal fastening initial liability on the insurer.

17. In **Meena Variyal's** case (supra 1), the claimants therein, who are the legal heirs, laid claim against the employer, the owner of the motor vehicle and against the Insurance Company and the deceased was driving the car, which was provided by the employer, along with his companion Mohmood Hasan on completing his work for the employer and it collided with a tree due to his rash and negligent driving. In the said fact-situation, the Hon'ble Supreme Court while reversing the decision of the High Court, restored the award of the Tribunal exonerating the insurer from liability, holding in paragraph Nos.29 and 30 thus:

> " 29. On the facts of this case, there is no finding that Mohmood Hasan, another employee of the owner was driving the vehicle. Even if he was, there is no finding of his negligence. The victim was the Regional Manager of the Company that owned the car. He was using the car given to him by the Company for use. Whether he is

[2] 2004 ACJ 1289

> treated as the owner of the vehicle or as an employee, he is not covered by the insurance policy taken in terms of the Act–without any special contract–since there is no award under the Workmen's Compensation Act that is required to be satisfied by the insurer. In these circumstances, we hold that the appellant Insurance Company is not liable to indemnify the insured and is also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the vehicle. The High Court was in error in modifying the award of the Tribunal in that regard.
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> 30. We therefore allow the appeal and reversing the decision of the High Court, restore the award of the Tribunal exonerating the appellant from liability. We make no order as to costs."

18. In **Appaji** (supra 2), the claim was laid under Section 163-A of the Act to wriggle out of the negligence or rashness on the part of the driver, whose legal heirs are the claimants, Hon'ble Division Bench of the High Court of Karnataka held in paragraph No.24 thus:

> "24. We may before parting make it clear that the accident in the instant case had taken place while the deceased was himself riding a two-wheeler. No other vehicle was involved in the accident against whose driver or owner could the claimant make a claim for payment of compensation on no fault basis under Section 163-A of the Act. There was no possibility of even accusing another vehicle or its driver of negligence or rashness. In cases where the accident involves two vehicles one accusing the other of negligence, it may be open to both to maintain a

claim on no fault basis under Section 163-A of the Act. That is because such a claim will be permissible no matter the driver or the owner of the other vehicle involved in the accident may dispute his negligence in the matter. The argument that while the claimant may not be required to prove fault, the respondents can prove that the accident had not occurred on account of any fault on their part must fail for once the respondent is allowed to set up that defence, the claimant will have to necessarily lead evidence to rebut the same by proving that the accident had indeed occurred on account of the fault of the respondents. Any such requirement of proving the fault having been dispensed with by Sub-section (2) to Section 163-A, permitting the respondents to set up the defence that the accident was without their fault would amount to negating the effect of the statutory provision dispensing with proof of fault."

19. When the aforesaid rulings are applied to the fact-situation occurring in the instant case, certainly, the petitioners herein cannot escape the consequence of the own negligence of the deceased in causing the accident and its consequences by merely laying a claim under Section 163-A of the Act. The order passed by the Tribunal fixing initial liability on the insurance company to pay the compensation amount and recover the same from the owner warrants interference as when the Tribunal did arrive at a definite finding on issue No.1 that the accident occurred due to the own negligence of the deceased in hitting a stationed lorry from behind while driving the auto-rickshaw, certainly, such direction ought not to have ordered.

Therefore, the order and decree passed by the Tribunal fastening initial liability on the insurer-appellant herein warrants interference.

20. Therefore, the instant appeal is partly allowed and the order and decree to the extent of fastening initial liability on the insurance company is hereby set aside. However, the order under challenge is maintained in all other respects as to the liability of the owner-respondent No.1 in the original petition to pay the compensation. There shall be no order as to costs.

21. The proceedings sheet would indicate that this Court by order dated 18.03.2009 in M.A.C.M.A. M.P. No.1495 of 2009, while granting stay, directed the insurance company to deposit half of the compensation amount with interest and costs. Later, by the order dated 05.06.2009 in M.A.C.M.A. M.P. No.2801 of 2009, permitted the petitioners-claimants to withdraw their respective shares from out of the deposited amount. Since the present appeal relates to the year 2009, almost seven years period elapsed, it would be reasonable to direct the Insurance Company to recover the amount withdrawn by the petitioners from respondent No.1-owner of the vehicle. The petitioners are at liberty to recover the balance amount from respondent No.1-owner of the vehicle.

22. As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, shall stand closed.

A. SHANKAR NARAYANA, J

DATE : 23-11-2016

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