HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

MACMA No.1813 of 2011

JUDGMENT :

Heard the learned counsel for the appellant and the respondent Nos.1 and 2, the claimants and perused the material on record. The appellant is the 2nd respondent insurer of the claim petition, the 1st respondent of the claim petition shown as the 3rd respondent herein, remained exparte before the Tribunal and notice even shown sent by registered post though there is no acknowledgement filed of proof of service, thereby apart from not necessary to implead in the appeal vide **Meka Chakra Rao v. Yelubandi Baburao**[1]**,** there is a presumption of due service also under Section 27 of the General Clauses Act.

2) The claim petition in O.P. No.188 of 2010 was filed by the two claimants for death of Nagabhushanachari, aged about 23 years, unmarried and the claimants are parents, leave about another person also died in the accident due to involvement of two vehicles while they were proceeding on the motor bike bearing No.AP 02 AB 4763 from the JCB of 1st respondent to the claim petition insured with 2nd respondent bearing No.AP 03 S 1136 stated coming in opposite direction, dashed the bike as a

result, they sustained multiple injuries and in the way to shifting to Government hospital, Anantapur breathed both last. The Tribunal held from the evidence of P.W-2, eye witness also to the accident with reference to Ex.A-1 F.I.R, Ex.a-3 post mortem report, Ex.A-5 charge sheet and Ex.A-4 M.V.I. report of the accident was the result of rash and negligent driving of the driver of the crime vehicle of the 1st respondent insured with 2nd respondent by awarding compensation of Rs.4,50,000/- with interest at 7.5% p.a. with joint liability. It is impugning the same, the appeal is filed with contentions that the driver possessed, undisputedly, L.M.V non transport, whereas the J.C.B is L.M.V. Transport and not having valid driving licence and the fixing of joint liability instead of exoneration from liability of the insurer is unsustainable and the other contention is the grant of compensation arrived is arbitrary and excessive as erred in deducting 1/3rd instead of half towards personal expenses of the deceased also and the other contention though not specifically raised is the J.C.B is a slow moving vehicle and but for contribution by the two persons deceased proceeding on the bike while in opposite direction, the accident could not be and fixing total liability on the insurer is unsustainable. Whereas, it is the contention of the learned counsel for the claimants that the award of the Tribunal holds good and for this Court, while sitting in appeal, there is nothing to interfere.

3) In ***Jiju Kuruvila V. Kunjujamma Mohan***[2], the Apex Court held that merely because two vehicles proceeding in opposite direction, it cannot be presumed of contribution or equal contribution but for to appreciate from the facts of the case. The contributory negligence depends upon several factors like condition of the road, width and the size of the vehicles involved and scene observation as to place of occurrence on the road and which vehicle if at all in wrong side if any. The evidence on record as appreciated by the trial Court with reference to the documents referred supra including from the eye witness deposition categorically speaks the J.C.B proceeding in wrong direction while coming in opposite direction while the deceased persons were proceeding on left side. Thus, there is nothing to attribute contribution. Once such is the finding arrived by the trial Court from appreciation of the evidence on record, for this Court while sitting in appeal and in view of the expression supra, there is nothing to interfere with that finding for nothing to show of said finding is perverse or unsustainable on facts and with reference to the law.

4) Coming to the quantum of compensation excessive or not concerned, undisputedly from the age of the mother among the two claimants mainly criterion, the

age of the claimants shown between 41 to 45 years and the multiplier that is applicable for persons aged between 41 to 45 is 14. Whereas, the Tribunal taken 15 wrongly instead of 14. The earnings of the deceased as on the date of accident 01.11.2009 though claimed as doing jewelry business, with no licence or income tax returns or sales tax returns etc., the earnings estimated by the Tribunal at Rs.5,000/- per month. In fact, even to say Rs.5,000/- per month there is no basis. However, the fact remains he was self-employed from the enclosed report also and even as per **Latha Wadhwa vs. State of Bihar**[3] the minimum Rs.3,000/- to be taken with prospective increase including from the self-employed if taken Rs.4,500/- per month if ½ to be deducted therefrom towards personal expenses it comes to Rs.2,250/- per month and after applying multiplier the compensation comes to Rs.3,78,000/- apart from Rs.25,000/- towards funereal expenses, Rs.10,000/- towards loss of estate, total comes to Rs.4,13,000/- is the just compensation to reduce from Rs.4,50,000/-. So far as liability of the insurer jointly or to be exonerated as contended or for pay and recovery the evidence on record of R.Ws 1 and 2 including from Exs.B-3 and B-2 registration extract of driving licence extract of driver shows the vehicle is L.M.V. Transport, the driver got L.M.V. non transport and as per ***National Insurance Company Limited Vs.***

Swaran Singh & Others[4]***, Kusumlatha and others V. Satbir and Others***[5] and ***S.Iyyappan Vs. United India Insurance Company***[6] the insurer has to pay and recover but not to be exonerated in toto muchless to be fixed with joint liability despite the defective licence. Hence, the joint liability fixed to be converted into pay and recovery.

5) In the result, the appeal is allowed in part by reducing the compensation from Rs.4,50,000/- to Rs.4,13,000/- and by modifying from joint and several liability of the insurer and insured to pay by the insurer and then to recover. The respondents shall deposit said amount within one month, failing which the claimants can execute and recover. It is made clear from the settled expressions of the Apex Court in **Lehru** (supra) & **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 claimants (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 claimant, 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.

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

Dr. B. SIVA SANKARA RAO, J

Date: 25-01-2016

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[1] 2001(1)ALT 495 DB

[2] 2013 ACJ 2141

[3] (2001) 8 SCC 197=AIR 2001 (SC) 3218

[4] (2004) 3 SCC 297=2004-ACJ-1

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

[6] (2013) 7 SCC 62