

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

M.A.C.M.A. No.433 OF 2010

JUDGMENT:

The 2nd respondent—insurer in O.P. No.1657 of 2007 among two respondents, including owner of the auto bearing No.AP 28 X 5618, filed the present appeal impugning the award dated 10.09.2009 passed in O.P. No.1657 of 2007 on the file of Motor Accidents Claims Tribunal-cum-III Additional Chief Judge, City Civil Court, Hyderabad, (for short 'the Tribunal') of the claim maintained by five claimants, no other than wife, three minor children and father of deceased Kondaiah (during pendency of appeal claimant No.5 since died the others on record being LR's the same is recorded) under Section 163-A M.V. Act for Rs.4,50,000/- since awarded by the Tribunal of Rs.3,75,000/- with interest at 7.5% per annum, with contentions that even the driver not having valid driving licence LMV transport but for non-transport fixing of liability instead of exoneration of the insurer, to the extent of pay and recovery is unsustainable and also that even the claim is under Section 163-A M.V. Act, the Tribunal gravely erred in taking the earnings of the deceased with no proof beyond what is provided by schedule-II as per structured formula and thereby, Rs.3,300/- per month arrived by the Tribunal is unsustainable and there is over loading of auto seating capacity of 3 +1 with 5+1 capacity which also contributed to the accident, Tribunal gravely erred in fixing liability on the insurer, thereby to refund the compensation by taking into consideration as per the liability and exonerate the insurer in toto from the expression of the Apex Court more particularly in ***Oriental Insurance Company Limited vs Syed Ibrahim***^[1], ***Sardari vs V.Sushil Kumar***^[2], ***National Insurance Company Limited vs Kaushalya Devi***^[3], and with reference to overloading from the expression of this Court in ***Agnuru Jaya Ramulu @ Jaya vs Mohammed Afzal Miyan***^[4].

2) The Respondent No.6 (owner of the vehicle), who is 1st respondent before the Tribunal remained *exparte* before the Tribunal, even notice not returned and proof of service not filed but for proof of notice since there is presumption under 27 of the General Clauses Act of deemed service for the same address in the claim petition earlier served held sufficient service, from his non-appearance taken as heard and perused the material including from the contentions of the claimants that but for no cross objections, there is nothing to interfere with the award of the Tribunal, thereby to dismiss the appeal. Perused the material on record.

3) So far as the overloading and contribution of the persons travelling in auto if any concerned, apart from nothing on record to show that any persons were on the side of the driver but for at back seat and as held by the Apex Court in ***B.V.Nagaraju vs Oriental Insurance Company Limited***^[5] in the absence of showing clear evidence of overloading contributed to the accident, mere overloading per se is not a ground for the insurer to be exonerated from indemnifying to pay compensation, for policy covered the risk. Even if taken for arguments sake from that overloading, any contribution of the persons travelling including injured of maximum 20%, what the Tribunal awarded with a finding under Section 166 of the Act that the accident was as a result of rash and negligent driving of the driver of the auto of the 1st respondent practically though mentioned as if under Section 163-A of the Act and mere wrong quoting of provision no way fatal even from what the provisions mentioned. Further as held by the Apex Court in ***Deepal Girish Bhai Soni vs United India Insurance Company Limited***^[6] that it is even if quoted Sections 166 and 163-A of M.V. Act left open to the claimants before commencement of trial or otherwise the Tribunal has to take under any correct provision. Further, another bench of this Court in ***Bhupati Prameela vs***

Superintendent of Police, Vizianagaram^[7] held by interpreting the aims and objects of the legislation that Court can take when the claim is mentioned as under Section 163-A as under Section 166 or vice-versa of which is beneficial to the injured. Thereby, it can be taken under Section 166 of the Act. From perusal of the award, though it does not specify as taken under Section 166 of the Act. The compensation awarded is infact utterly low even taken any contribution of 20% by deceased for remaining liability of 80% to say more than what was awarded the claimants are entitled, but for no cross objections to enhance. Now coming to the exoneration of the insured on the ground of the driver got only LMV non-transport instead LMV transport, law is fairly settled from the expression of the three judge bench in **National Insurance Company Limited Vs. Swaran Singh & Others**^[8] that is no way overruled much less distinguished much less explained in any of the subsequent expressions placed reliance by the insurer, apart from even by the subsequent expressions reiterating Swaran Singh (supra) in **S.Iyyappan Vs. United India Insurance Company**^[9] and **Kusumlatha and others V. Satbir and Others**^[10].

Having regard to the above, there is nothing to interfere with the Pay and recovery liability also, but for to clarify the pay and recovery directions.

4) Accordingly and in the result, the appeal is disposed of, while upholding the findings of the Tribunal including on the quantum of compensation and liability to pay and recover however by detailing pay and recovery directions as follows:- The Insurer shall deposit said amount within one month, failing which the claimants can execute and recover. It is made clear that the insurer is entitled, while depositing half of the amount payable for 1st respondent in claim petition, from pay and recovery liability to approach the Tribunal to direct the RTA concerned not to register any transfer of the auto and to seek for

attachment of the auto 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 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.

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

Dr. B. SIVA SANKARA RAO, J

Dt.05.01.2016
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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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[1] 2007 ACJ 1336
[2] 2008 ACJ 1307
[3] 2008 ACJ 2144
[4] 2006 ACJ 855
[5] 1996 ACJ 1178
[6] 2004 (5) SCC 385
[7] 2010 (4) ALD 531
[8] (2004) 3 SCC 297=2004-ACJ-1
[9] 2013 (7) SCC 62
[10] AIR 2011 SC 1234 = 2011 (2) SCJ 639