THE HONOURABLE SRI JUSTICE M.SEETHARAMA MURTI

MA CMA Nos.4851 of 2004 and 236 of 2005

COMMON JUDGMENT:

Since both the CMAs filed under Section 173 of the Motor Vehicles Act, 1988 ('the Act' for brevity) arise out of a common award dated 02.09.2004 passed in MVOP. No.1204 of 2001 on the file of the learned Chairman, Motor Accidents Claims Tribunal-cum-VI Additional District Judge, Nizamabad, [Judge, Fast Track Court] ('the Tribunal', for brevity), the CMAs are being disposed of by this common judgment.

1.1 C.M.A.No.236 of 2005 is filed by the injured claimant being not satisfied with the awarded quantum of compensation.

1.2 C.M.A.No.4851 of 2004 is filed by the 2nd respondent-insurance company assailing the award particularly in regard to direction to it to first pay the compensation amount to the claimant and then recover it from the 1st respondent.

2. I have heard the submissions of the learned counsel for the injured/claimant ('claimant', for brevity) and the learned counsel for the 2nd respondent-insurance company ('insurance company', for brevity). The CMA no.236 of 2005 is dismissed for default against the 1st respondent. None appeared for the said first respondent in CMA 4851 of 2004. It is represented that the first respondent owner of the vehicle involved in the accident is not a necessary party in view of the Division Bench decision of this Court in **Meka Chakra Rao v. Yelubandi Babu Rao @ Reddemma and others**[1].

3. To begin with, it is necessary to state the cases of the parties and the facts that lead to the filing of these appeals.

3.1 The case of the claimant is this:

On 29.03.2001 at about 10.45 PM, the claimant along with others had travelled in a jeep bearing registration No.MTJ-7044 from Nandipeta to go to Nizamabad. On the way, when the Jeep reached a place near Chikli (V) shivar big bridge, the driver drove the jeep at a high speed and in a rash and negligent manner; as a result, the jeep had capsized. In the said accident, the petitioner sustained fracture injuries, viz., fracture of left clavicle and fracture of left ankle besides injury to shoulder and other grievous injuries. He was treated by the duty Medical Officer, Government Hospital, Nizamabad. As on the date of the filing of the claim petition, he had incurred an expenditure of Rs.40,000/- on his treatment and medicines and he is still receiving the treatment. On account of the injury sustained in the accident, he is not able to walk and lift weights and he had suffered monetary loss and mental agony. Prior to the accident, he was hale and healthy and was earning Rs.7,000/- per month on his business and used to contribute the said income for the maintenance of the family. As he had suffered permanent disability and the injuries had affected his earning capacity, he is not able to attend to his regular duties and support his family and he and his family members are living in a miserable condition. If he had not been involved in the accident, he would have lived a healthy life and would have continued to earn till the age of 70 years. The 1st respondent is the owner-cum-insured and the 2nd respondent is the insurer of the said jeep involved in the accident. Both the respondents are jointly and severally liable to pay a compensation of Rs.1,00,000/- to the claimant.

3.2 The 1st respondent having filed a counter denying the allegations and the claim of the claimant had *inter alia* pleaded that his vehicle is insured with the 2nd respondent and that at the time of the accident, the driver of the jeep held a valid driving licence to drive the jeep and that the jeep was road worthy and that therefore, the 2nd respondent is alone liable to pay any compensation that is payable to the claimant.

3.3 The insurance company filed a written statement *inter alia* contending

as follows:

The claimant is put to strict proof of each and every allegation and also his entitlement to claim compensation. The insurance company is not aware of the accident. The 1st respondent did not inform it about the accident, as required under law and as per policy conditions. The manner and method of accident pleaded by the claimant and the injuries and the disability said to have been suffered by him on account of his involvement in the pleaded accident are denied. His age, occupation and income as pleaded in the petition and the medical expenses said to have been incurred are denied. The driver of the jeep allowed more than the permitted number of passengers to travel in the jeep and therefore, he was unable to control the jeep. The accident had occurred due to the sole negligence of the driver of the jeep. Hence, the insurance company is not liable. The compensation claimed is high and excessive. The rate of interest is to be restricted to 9% as per the decision of the Supreme Court. The liability of the insurance company is only in strict accordance with the law and the terms and conditions of the policy in respect of the jeep.

4. Taking into consideration the above pleadings, the tribunal had framed the following issues:

1. Whether the accident has taken place due to rash and negligent driving of the vehicle bearing NO.MTJ-7044 by its driver?
2. Whether the petitioner is entitled for compensation? If so, to what just amount and from which of the respondents?
3. To what relief?

At trial, the claimant and a doctor were examined as PWs 1 and 2 and exhibits A1 to A5 were marked on his side. No evidence was adduced on the side of the 1st respondent. No evidence was reported on the side of the 2nd respondent.

5. After full-fledged trial, the tribunal had awarded a compensation of

Rs.37,000/- with interest at 9% from the date of the petition till the date of deposit and had directed both the respondents to deposit the compensation amount with interest and costs within one month from the date of the award. In the operative portion of the award, while holding that the liability of the respondents is joint and several, it is further observed that the 2nd respondent is at liberty to recover the compensation amount paid by it from the 1st respondent.

6. The case of the injured claimant as per the grounds urged and the submissions made is that he had suffered fracture of left clavicle and left ankle and that he had incurred huge expenditure on his treatment, medicines, transport, extra nourishment, attendant and other charges and that he had suffered permanent disability, but the tribunal had awarded a meagre compensation and that the tribunal had erroneously brushed aside the medical evidence, which is unrefuted and that the tribunal did not award any compensation towards loss of future income and loss of earning capacity though the injuries sustained, which had resulted in permanent disability, had impacted his capacity to earn.

7*. Per contra,* the case of the insurance company as per the grounds and the submissions is that the driver of the jeep had no valid driving licence, as on the date of the accident, to drive the jeep and that the tribunal had erred in fastening the liability on the insurance company and in directing it to first pay the compensation to the claimant and then recover it from the 1st respondent (owner of the vehicle) and that the tribunal had failed to take note of the fact that in all 'eight' persons had travelled in the jeep though the capacity of the vehicle is 'five' and that therefore, the liability of the insurance company is only to the extent of valid claims of five persons involved in the accident and that the insurance company has no statutory liability to pay compensation to more than five claimants and that the tribunal ought to have seen that some other claim petitions filed by some other claimants involved in the very same accident are yet to be disposed of and that therefore, the tribunal ought to have issued suitable directions restricting the liability of the insurance

company in respect of only five valid claims and that the tribunal erred in awarding huge compensation to the claimant.

8. Dealing first with the issue in regard to rash and negligent driving of the jeep by its driver, PW1, the injured claimant having deposed about the manner and method of accident had exhibited the certified copies of the FIR and the charge sheet and also his wound certificate as exhibits A1 to A3 and had maintained his stand on this aspect in his cross-examination. No rebuttal evidence was adduced. Therefore, having regard to the evidence of PW1, which is well corroborated by the contents of exhibits A1 to A3, the tribunal had rightly held that the pleaded accident resulting in injuries to the claimant had occurred due to the rash and negligent driving of the driver of the jeep.

9. Coming to the issue as to whether the compensation awarded is just, fair and reasonable, it is necessary to first note that the claimant had sustained the following grievous injuries: 'Fracture of left clavicle and fracture of left ankle'. His wound certificate-exhibit A3 issued by the Medical Officer-cum-Civil Assistant Surgeon, Government Headquarters Hospital, Nizamabad also evidences the said fact. PW1 in his evidence had stated that he was shifted to Government Hospital, Nizamabad and was treated for two days and that later, he had received treatment from Dr.Ramulu in a private hospital for one month as inpatient and that he had spent Rs.30,000/- to Rs.40,000/- on his treatment and that after the accident, he is not able to do his work as in the past and that he is doing his works with difficulty and that he is suffering and experiencing pain while walking. He had further deposed that he used to do business in turmeric and earn Rs.6,000/- or Rs.7,000/- per month. In his cross-examination, he had denied the suggestion that he was discharged from the hospital on the same day and that he had never received any treatment from Dr.Ramulu and that he did not sustain any injuries and did not incur any expenditure as stated by him. He had admitted that he did not file any medical bills. He had exhibited A4, his disability certificate issued by Dr.Ramulu. PW2, Dr.Ramulu in his evidence had stated about the two grievous injuries sustained by PW1 and had further stated that he had treated PW1 in the Outpatient Ward of the Government Hospital, Nizamabad and that

he had issued exhibits A3 and A4 and that exhibit A3 bears his signature. He had further deposed that on 06.11.2001 he had again examined PW1 physically and clinically and had verified his old records and found that the fracture clavicle mal-united and that the movements of the shoulder are painful and restricted and that the movements of left ankle are restricted and painful and that PW1 had suffered 50% permanent partial disability as stated in exhibit A4. In his cross-examination, he had denied the suggestion that he had issued exhibits A3 and A4 with false contents to help PW1 and that PW1 had not sustained any injuries and disability as stated therein and by him and that he is deposing incorrectly to help PW1. He had admitted that there is a medical board in the Nizamabad Hospital and that he is not a member of the said Board and that he is not having case sheet with him to speak about the treatment received by PW1 and that he did not use scientific scale while fixing the percentage of disability.

10. I have thus carefully gone the evidence. Keeping in view the facts and the evidence, it is necessary now to determine the compensation. The evidence brought on record sufficiently established that the claimant sustained two major fracture injuries. In view of the evidence of the doctor, particularly, his statement that while determining the percentage of disability, he did not use the scientific scale, it can be safely said that the evidence to the effect that the claimant sustained 50% permanent partial disability cannot be accepted. Further, the claimant did not state in his evidence that the movements of his left shoulder and ankle are painful and restricted. Though PW1 had stated that he is not able to do his work as usual and that he is doing his work with difficulty and that he is suffering pain while walking, he did not produce a disability certificate issued by the Medical Board of the Government Hospital. Though he had stated that he had received inpatient treatment in a private hospital from Dr. Ramulu (PW2), he did not produce any medical record like case sheet and hospital bills. Dr. Ramulu also did not support him on this aspect. The tribunal awarded Rs.10,000/- for the injuries. However, the fact is that the claimant, at an young age of 20 years, had suffered two major injuries. Even simple injuries cause painful

experience to the victim and take a minimum of two to three weeks' time for complete healing. Major injuries like fractures take 4 to 6 weeks or 6 to 8 weeks time for total healing depending upon the nature of the fracture and other factors. A further time of one or two months is generally required for physiotherapy and getting normal movements of the limb. The shock, pain and suffering at the time of accident, pain, discomfort and inconvenience during the period of treatment, hospitalisation, bed rest and physiotherapy can be visualised taking into consideration the day to day human experience. Therefore, a compensation of Rs.25,000/- is awardable as compensation under the heads 'injury', 'shock', 'pain' and 'suffering' and the same is accordingly awarded.

12. The claimant did not exhibit any medical record except exhibits A3 and A4, though his contention is that he had incurred huge expenditure on his treatment and medicines and that he had also received inpatient treatment in a private hospital. It is common knowledge that even patients receiving treatment in Government Hospital also incur expenditure on transport, extra nourishment, medicines purchased from outside, attendant, besides other incidental charges. During the period of hospitalisation and bed rest, a person might have attended upon the claimant cannot be disputed. In a decision in **Managing Director, APSRTC v. Kathavath Gopal and another,**[2] this Court held that compensation towards expenditure incurred on extra nourishment and transport cannot be denied even though treatment was given in Government Hospital and one cannot expect positive evidence proving actual expenditure and hence some reasonable hypothesis cannot be ruled out. In the facts and circumstances of the case, a sum of Rs.15,000/- awarded by the tribunal under this head cannot be said to be on the higher side. Hence, the said sum is accordingly awarded as compensation under the heads 'hospital, medical, extra nourishment, attendant's, transport and incidental charges'.

13. As regards the claim under loss of earnings (past, present and future), though it is the case of the claimant that he had suffered permanent disability,

for reasons as already noted supra, this Court finds that there is no reliable evidence to hold that the claimant suffered permanent partial disability, which impacted his earning capacity. Therefore, no compensation is awardable under the head 'loss of future earnings' considering the evidence that he is aged 20 years and that he had sustained two major fractures and that a minimum of 3 to 4 months is required for complete healing and a further time of one or two months is required for physiotherapy and getting normal movements of the limbs, it is reasonable to accept that he is out of work for at least six months. In the absence of reliable evidence regarding his occupation and income, a sum of Rs.12,000/- was awarded by the tribunal towards loss of earnings, past and present after taking into consideration Rs.2,000/- as the monthly earnings keeping in view the minimum daily wage earnings of a daily wager at that relevant point of time. This Court finds that the said sum awarded under the said head can be confirmed, in the facts and circumstances of the case. Considering the facts of the case and the evidence brought on record, this Court is of the considered view that no compensation is also awardable under the group of heads 'loss of prospects of life, loss of amenities of life, loss of enjoyment of life, loss of opportunities of life (economical, political and social), loss of pleasures of life, loss of expectation of life and social disability' and other group of heads.

14. Accordingly, the claimant is entitled to the following compensation amounts:

Sl. No.	**Head of compensation**	**Amount (in Rs.)**
(1)	Injury, shock pain and suffering	25,000-00
(2)	Hospital, medical, extra nourishment, special diet and nutrition, attendant's, transport and incidental charges	15,000-00
(3)	Loss of earnings past and present	12,000-00
Total		52,000-00

(Rupees Fifty two thousands only)

In the facts and circumstances of the case, the claimant is not entitled to any other compensation amounts. Thus, as per the determination supra, the reasonable, just and fair compensation to which the claimant is entitled to is Rs.52,000/. The compensation is accordingly awarded. The point is accordingly answered.

15. Dealing with the issue in regard to the liability of the insurance company, it is necessary to note its contentions, which are as follows: 'The tribunal erred in fastening joint and several liability on the insurance company along with the 1st respondent and in directing it to first pay and then recover the compensation from the 1st respondent. The tribunal ought to have exonerated the insurance company from the liability to pay the compensation to the claimant. In any view of the matter, since the seating capacity of the vehicle is five including driver and as the driver had allowed eight persons to travel in the jeep, the liability of the insurance company is only to the extent of valid claims of five persons involved in the accident and that the insurance company has no statutory and contractual liability to pay compensation to more than five claimants. The tribunal ought to have seen that some other claim petitions filed by some other claimants involved in the very same accident are yet to be disposed of. Therefore, the tribunal ought to have issued suitable directions restricting the liability of the insurance company in respect of only five valid claims.' Be it noted that there is no evidence or material before this Court to show that more than five claimants involved in the pleaded accident had made claims for compensation against the insurance company. Unless it is established that more than five claims are made, the contentions of the insurance company on this score need not be countenanced. For reasons recorded, the tribunal having held that the driver had no valid driving licence to drive the jeep had further held that the insurance company is entitled to first pay the compensation to the claimant and then recover it from the 1st respondent in view of violation of terms and conditions of the policy. The tribunal had held as above for the reason that the 1st respondent had failed to adduce any evidence to show that his driver held a valid and effective driving licence to drive the jeep. In fact, the tribunal

did not record any finding as to whether such breach is by the owner and that the said breach, if any, is fundamental.

In **Lakshmi Chand v. Reliance General Insurance** [2016 ACJ 551], the Supreme Court having referred to the earlier precedents held as follows:

The National Commission upheld the order of dismissal of the complaint of the Appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of *B.V. Nagaraju v. Oriental Insurance Co. Ltd. Divisional Officer, Hassan* : (1996) 4 SCC 647. In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. This Court in the said case has held as under:

It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver. If those six workmen when travelling in the vehicle, are assumed not to have increased risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the pose, keeping apart the load it was carrying. In the present case the driver of the vehicle was not responsible for the accident. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves, had gone to contribute to the causing of the accident.

(Emphasis laid by this Court)

16. Further, in the case of *National Insurance Co. Ltd. v. Swaran Singh & Ors.* (2004) 3 SCC 297 a three judge bench of this Court has held as under:

49. Such a breach on the part of the insured must be established by the insurer to show that not only the insured used or caused or permitted to be used the vehicle in breach of the Act but also that the damage he suffered flowed from the breach.

52. In Narvinva's case (supra) a Division Bench of this Court observed: "The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract complaints of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led.

69. The proposition of law is no longer res-integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evident. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability.

(Emphasis laid by this Court)

17. The judgment in the case of *Swaran Singh* (supra) has been followed subsequently in the case of *Oriental Insurance Co. Ltd. v. Meena Variyal* : (2007) 5 SCC 428, wherein this Court held as under:

We shall now examine the decision in Swaran Singh on which practically the whole of the arguments on behalf of the claimants were rested. On examining the facts, it is found that, that was a case which related to a claim by a third party. In claims by a third party, there cannot be much doubt that once the liability of the owner is found, the insurance company is liable to indemnify the owner, subject of course, to any defence that may be available to it Under Section 149(2) of the Act. In case where the liability is satisfied by the insurance company in the first instance, it may have recourse to the owner in respect of a claim available in that behalf, it may have recourse to the owner in respect of a claim available that behalf. Swaran Singh was a case where the insurance company raised a defence that the owner had permitted the vehicle to be driven by a driver who really had no licence and the driving licence produced by him was a fake one. There Lordships discussed the position and held ultimately that a defence Under Section 149(2)(a)(ii) of the Act was available to an insurer when a claim is filed either Under Section 163A or Under Section 166 of the Act. The breach of a policy condition has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence of or production of fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third party. The insurance company to avoid liability, must not only establish the available defence raised in the proceeding concerned but must also establish breach on the part of the owner of the vehicle for which the burden of proof would rest with the insurance company. Whether such a burden had been discharged, would depend upon the facts breach on the part of the insured concerning a policy condition, the insurer would not be allowed to avoid its liability towards the insured unless the said breach of condition is so fundamental as to be found to have contributed to the cause of the accident.

(Emphasis laid by this Court)

18. It becomes very clear from a perusal of the above mentioned case law of this Court that the insurance company, in order to avoid liability must not only establish the defence claimed in the proceeding concerned, but also establish breach on the part of the owner/insured of the vehicle for which the burden of proof would rest with the insurance company. In the instant case, the Respondent-Company has not produced any evidence on record to prove that the accident occurred on account of the overloading of passengers in the goods carrying vehicle. Further, as has been held in the case of *B.V. Nagaraju* (supra) that for the insurer to avoid his liability, the breach of the policy must be so fundamental in nature that it brings the contract to an end.

In view of the settled legal position and the facts and circumstances of the case, this court finds no reason to interfere with the said finding of the Tribunal. Viewed thus, this Court finds that there is no merit in the contentions of the insurance company that it is entitled to be completely exonerated from the liability.

16. Having regard to the findings, the MACMA filed by the claimant is

allowed in part with proportionate costs and a compensation of Rs.52,000/- (Rupees fifty two thousand only) in all is awarded to the claimant. On the enhanced compensation of Rs.15,000/- the claimant is entitled to interest @ 7.5% per annum simple from the date of the claim petition, i.e., 19.07.2001. The insurance company is directed to deposit before the tribunal the said enhanced compensation with interest within two months from the date of receipt of a copy of this judgment. The insurance company is also directed to pay or deposit within the said time the already awarded compensation also as per the award of the tribunal, if not already deposited or paid. On such deposits, the claimant is entitled to withdraw the entire compensation with interest and costs. As a sequel, the CMA filed by the insurance company is dismissed confirming the finding that it is entitled to first pay the compensation with interest and costs to the claimant and recover it from the 1st respondent in accord with the settled legal position.

Miscellaneous petitions, if any, pending in these appeals shall stand closed.

M. SEETHARAMA MURTI, J

22nd April, 2016
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[1] 2001 (1) ALT 495

[2] 2003(5) ALD 198