HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

MACMA MP No.545 of 2011 in MACMA No. 99 of 2016 & MACMA No. 99 of 2016

COMMON ORDER :

The 4th respondent among four respondents ie., owner of the Tata Indica car bearing No.AP 9 AD 2412 driven by its driver-3rd respondent to the claim, aggrieved by the claim maintained by the 5 claimants no other than wife and minor children of late Peda Yesobu died on 09.11.2007 in a motor accident while traveling on the goods auto of claim petition 1st respondent auto bearing No.AP 7 W 5517 insured with 2nd respondent ICICI Lombard General Insurance Company Limited, from the Tribunal in the claim maintained under Section 166 of the Motor Vehicles Act of Rs.6,20,000/- awarded Rs.4,19,000/- with interest at 7% p.a. against the driver and owner of the said Tata Indica car, preferred the appeal impugning the said award by showing the claimants of the claim petition respondent Nos.1 to 3 as appeal respondents and in filing the appeal with delay of 142 days in preferring the same, sought for condonation saying financial difficulties. The 8th respondent is the driver of the Tata Indica even dismissed for default, having remained exparte before the Tribunal and among the claimants, so far as 4th claimant concerned, dismissed for default for unserved even to the same address served others no way fatal as other claimants all representing and hence, the delay is condoned.

2) Heard the learned counsel for the claimants and the learned counsel for the respondent Nos.1 to 5 and also the counsel for the 7th respondent insurer of the goods auto supra and perused the material on record.

3) The Tribunal held that as it is a goods auto with seating capacity one meant for driver and not to accommodate any person to sit and travel, the evidence on record shows, the deceased and another person no other than P.W-2 were traveling along with driver and the policy Ex.B-1 no way covered the risk other than the driver for any passengers to accommodate even to say pay and recovery liability, from the evidence of P.W-2 in particular as eye witness held also from the charge sheet filed under Ex.A-5 by the police against investigation against the driver of the Tata indica i.e., the claim petition 3rd respondent with vicarious liability of the owner 4th respondent who is the appellant herein, fixed the compensation by exonerating the trolley auto, owner and the insurer from liability. It is impugning the same, the contentions in the grounds of appeal by the driver of the owner of the Tata Indica is that when the auto also involved in the accident while proceeding in the opposite direction exoneration of the auto from liability is unsustainable apart from the factum of the insurer of the

auto can be made liable of the persons carrying goods are liable by statutory liability, hence to fix the joint liability on the auto and if not with joint liability from the contribution. The learned counsel for the appellant reiterated the same.

4) Whereas it is the contention of the learned counsel for the claimant that whatever he is entitled fixed by the Tribunal thereby there is nothing to interfere but for the Court to decide. Whereas it is the contention of the learned counsel for the insurer of the auto i.e., the 7th respondent to the appeal and the 2nd respondent to the claim petition, the law is fairly settled that once there is no seating capacity in a goods trolley meant for driver to sit, there are expressions of this Court in ***Vachala V. V.R.Kumar***[1]***, Lodhia shankar V. New India Assurance Co. Ltd*** saying insurer cannot be made liable and the person without seating capacity traveling is no other than unauthorized passenger and the other contention is by placing reliance upon ***National insurance Company V. Cholleti Bharatamma***[2] but to make the insurer liable, there must be seating capacity and the person is owner and attender of goods must travel by sitting in the cabin and not on the goods and thereby exonerated, the insurer from the liability and having regard to the above settled law, the Tribunal is

right in exonerating the insurer and also the auto owner for no fault of driver even as it is finding from the evidence on record also from the police final report taken cognizance against the driver of the Tata Indica car of the appellant, for no fault of the driver of the auto. It is also the contention that in the grounds of appeal there is no specific plea taken by the appellant of any contributory or composite negligence but for to say auto covered by insurance and thereby when there is no plea muchless to impugn the award of the Tribunal on issue No.1 finding Tata Indica car driver alone responsible for the accident, the appeal is liable to be dismissed for nothing to interfere.

5) Heard at length and perused the entire material on record.

6) Once the appeal is filed even against a portion of decree or judgment, entire matter is at large for re-appreciation more particularly from the scope of Order XLI Rule 33 C.P.C. As such from the grounds 2 and 3 besides a general ground of such other grounds to be urged merely because no specific ground expressly taken, when it infers and enables the contention of the insurer of the auto of no contention can be allowed to impugn the finality on the finding of the Tribunal on negligence of the driver of the Tata Sumo with no negligence of the driver of the auto, is untenable. In fact when fixing the liability on the auto itself is negligence.

Here, no doubt the insurance covers from the act liability from Ex.B-1 policy of the goods trolley only risk of one person i.e., the driver with one seating capacity and not for any other person. However, as held by the Apex Court in ***National Insurance Company Limited V. Prem Bhai Patel***[3] with reference to Section 147(1) (a) to (c) of the Act, one of which specifically covers the owner or attender of goods, statutory liability of the insurer from even an act policy once even there is no seating capacity for the owner or attender of the goods to travel for the goods vehicle by such violation of permit or policy when policy covered the risk by virtue of the Act policy itself from that expression the insurer cannot avoid liability in the event of any contribution by the accident by the auto driver also to indemnify but for to pay and recover including the expression of ***B.V.Nagaraju V. Oriental Insurance Co. Ltd.***[4] Here the question now arises further to answer whether there is any contribution of the auto driver also. In fact, the allowing of the two persons to sit and travel in the cabin in the goods auto with building construction material loaded in the goods auto even there is only one seating capacity of the driver alone itself shows the impossibility to control the vehicle by the driver of the auto with that overloading beyond seating capacity only for driver. Apart from while both vehicles proceeding in opposite direction suffice to say there is atleast 20%

contribution including from the overloading on the part of the driver of the goods auto also though that was from the claim petition averments, it is the averment of the opposite coming Tata Indica car with high speed, came in wrong direction. In fact, there is head on collusion not in dispute including from the averments. No doubt, the counsel for the insurer, at this juncture expression of the Apex Court of for this Court while sitting in appeal to brush aside finding of the Tribunal, Tata Indica alone at negligence there is nothing to interfere vide ***Jiju Kuruvila V. Kunjujamma Mohan***[5] this Court being conscious of the legal position since what it observed supra that when the overloading of the goods auto itself shown inability to control to aver the accident is a contribution though major contribution is on the part of the Tata Indica driver. It is just to fix 20% liability on the auto trolley driver of the vehicle belongs to the 1st respondent of the claim petition insured with the 2nd respondent who are respondent Nos.6 and 7 of the appeal. To that extent, the appeal requires to allow.

7) Accordingly and in the result, while condoning the delay in filing the appeal, the appeal from hearing partly allowed by fixing 20% contribution on the part of the auto trolley driver for the owner and insurer liable to pay and recover from allowing two persons to travel with the driver by permit and policy violation of the Act policy even otherwise for a goods vehicle owner or attender of the

goods is entitled to indemnify statutorily under Section 147 of the M.V.Act and to pay by the insurer and then to recover. The respondents shall deposit said amount within one month, failing which the claimant can execute and recover. It is made clear from the settled expressions of the Apex Court in **United India Insurance Co. Ltd. V. Lehru**[6] & ***Oriental Insurance Company Limited Vs. Nanjappan & Others***[7] 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 claimant (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.

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

Dr. B. SIVA SANKARA RAO, J

05.01.2016
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[1] 2004(5) ALT 460

[2] 2008 ACJ 268 (SC)

[3] (2005)6 SCC 172

[4] 1996 ACJ-1178

[5] 2013 ACJ 2141

[6] JT-2003(2) SC 595 = 2003 ACJ 611

[7] (2004) 13 SCC 224=2004-SAR(civil)-290