

HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

M.A.C.M.A.No.168 of 2010

JUDGMENT:

The 2nd respondents Insurer among the two respondents including the owner of the tractor bearing No.AP-25-L-7359 in the claim petition O.P.No.848 of 2005 on the file of the learned Chairman, Motor Accidents Claims Tribunal-cum II Addl. District Judge (FTC), Nizamabad (for short, 'the tribunal') filed by the claimants, no other than the parents of the deceased-Cobbler, aged about 16 years by name Jeevan as per Ex.A.3 postmortem report under Section 166 of the Motor Vehicle Act, 1988 (*for short, 'the Act'*), for compensation of Rs.4,00,000/-, is the appellant in filing the appeal impugning the award of the tribunal on 30.03.2009 fixing joint liability on the owner and Insurer granting compensation of Rs.2,63,000/- with interest at 7.5%p.a.

2. The contentions in the grounds of appeal vis-à-vis the oral submissions of the appellant are that the tribunal gravely erred in fixing joint liability against the Insurer despite the vehicle is in use for commercial purpose and the policy is only for agricultural purposes covered by farmers package policy and the deceased is unauthorized passenger of the goods vehicle and even to say engaged by the owner of the vehicle for loading and unloading as a labourer, the risk is not covered by policy to indemnify and the amount of compensation awarded is also excessive and exorbitant to reduce.

3. The factual matrix is that on 15.06.2005, the deceased and another while proceeding in said tractor to unload Shahbad stones at Sunket village and when reached village outskirts on Sunket road of Morthad, Nizamabad district at about 4.00p.m., on the instructions of said driver

having checked air in the tyres of the tractor, while boarding the tractor, due to the rash and negligent driving of the driver of the tractor, the deceased fell down and the rear tyre of the tractor ran over causing multiple injuries and breathed the last in the way to Government Hospital, Armour for treatment. It was on contest by the 2nd respondent-Insurer of non-liability on various grounds and from the 1st respondent-owner remained *ex parte*, held by the tribunal by its award that there is vicarious liability on the R.1-owner from the admission in cross-examination of the R.W.1-employee of the Insurer(R.2) of the accident occurred due to rash and negligent driving on the part of the driver of the tractor employed by R.1 besides the evidence of claimants that the R.1 employed the deceased and the P.W.2 B.Ramesh to load and unload the stones and for the accident was caused due to rash and negligent driving of the driver of the tractor granted compensation of Rs.2,63,000/- with interest at 7.5%p.a. by fixing liability against both the respondents. Impugning said award, the Insurer preferred the appeal to set aside the award by allowing the appeal.

4. The 3rd respondent of the appeal-owner though served notice failed to turn up, taken as heard. Heard the learned counsel for the appellant-Insurer who reiterated the same during the course of hearing and whereas, the respondents 1 and 2-claimants supported the award of the tribunal with the contention of no grounds to interfere with the award of the tribunal but for no cross-objections to enhance the amount. Perused the material on record.

5. As held by the Apex Court in National Insurance Company Vs. Sanjeev Kumar Samrat¹ and National Insurance Company Limited vs. Saju P. Paul², the question of the liability of the Insurer to indemnify the

¹ 2013 ACJ page 1

² (2013) 2 SCC 41

insured arises when the policy covers the risk and not otherwise. Here it is to be seen basically whether the policy covers the risk or not. There is no specific averment referring the policy in the counter but for the general averment disputing liability to indemnify. Ex.B.1= Ex.A.6 is the copy of policy not in dispute of the terms therefrom. The evidence of R.W.1- employee of the Insurer coupled with the policy and from Ex.A.5 R.C. book show that the vehicle is for agricultural purposes and it is covered by agricultural package policy. The trailer number is not mentioned and it is with Shabad stones but for on the trailer to load and propelled to the tractor, the taking of the load by tractor does not arise and it shows the persons were traveling, leave about others particularly the deceased by the side of the driver of the tractor though tractor is meant to accommodate only a driver with single seat from the permit and but for sitting by the side of the tractor on the mudguard if any, the falling while attempting to board again after checking the air of the tyres of the tractor trailer, under the back wheels of the tractor does not arise. Suffice to say the deceased was unauthorized passenger. Here, that is not the be all of the lis as the very undisputed facts supra clearly show from said evidence on record including from P.W.2 of the deceased having get down while traveling, on the instructions of the driver to check the air of the tryes and having done so while boarding or attempting to board fell down. The moment fell down, even the earlier travelling and again to board on the tractor to travel tantamounts to unauthorized, he is a third party and further not because of fall he was succumbed but after fall and as third party for having been run over under the wheels of the vehicle due to rash and negligent driving of the driver, the deceased was succumbed with no lapse of time from the crush injuries as also revealed from the Ex.A.3 P.M.report and the Ex.A.2 chargesheet against the driver apart from Ex.A.4 M.V.I. not showing any

mechanical defects in the vehicle for causing accident. Having regard to the above and following the expressions in *Thoznilalar Transport Company vs Valliammalal*³ *A.Subramani vs Mani*⁴ *NIC vs Savithri Devi*⁵ *Oriental Insurance Company Limited vs. Edward D'Cruz Rodrigues*⁶, *United India Insurance Company Limited vs Kurva Yejju Mallamma*⁷, the negligence of the deceased therefrom even taken to 50% and the respondents are liable for the other 50%

6. Coming to the 50% liability of the respondents, the accident was dated 15.06.2005. The deceased was aged 16 years and the claim is under Section 166 of the Act, and as per the expression of the Apex Court in *Latha Wadhwa vs. State of Bihar*⁸ as on the date of accident, the earnings of the deceased even from that age even as cooli if not as Cobbler also, can be estimated at Rs.3,400/-p.m. and if half deducted towards personal expenses, it comes to Rs.1700/- x 12 x 15 = Rs.3,06,000/- + Rs.35,000/- towards funeral expenses and loss of estate = Rs.3,41,000/- and 50% therein comes to Rs.1,70,500/- is the compensation the claimants are entitled.

7. Accordingly and in the result, the appeal is allowed in part, by reducing compensation awarded by the tribunal from Rs.2,63,000/- to Rs.1,70,500/- and upholding the award in other respects. There is no order as to costs. Pending miscellaneous petitions, if any, in this appeal shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:19.01.2017
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³ 1990 ACJ 201 (Madras)

⁴ 1990 ACJ 37 (Madras)

⁵ 1991 ACJ 1991 (Delhi)

⁶ 1995 ACJ 1106 (Bombay and Panaji)

⁷ 2007 (3) ALT 366 AP

⁸ (2001) 8 SCC 197=AIR 2001 (SC) 3218