

HON'BLE Dr. JUSTICE SHAMEEM AKTHER
M.A.C.M.A. Nos.1305 OF 2006 & 4042 OF 2009

COMMON JUDGMENT:

1. Both these Appeals arose out of the orders, dated 15.09.2005, passed in M.A.T.O.P. Nos.1270 and 1267 of 2001 on the file of the Chairman, Motor Vehicle Accidents Claims Tribunal-cum-II Additional District Judge (Fast Track Court-1), Khammam (for short, 'the Tribunal').

2. M.A.C.M.A. No.1305 of 2006 (former appeal) is preferred by the appellant-3rd respondent (insurer), aggrieved by the award of compensation of Rs.1,92,000/-, against the original claim of Rs.2,50,000/-, with proportionate costs and interest at 7.5% per annum from the date of petition till realisation, by the Tribunal, in M.A.T.O.P. No.1270 of 2001, filed under Section 166 of the Motor Vehicles Act, 1988 (for short, 'the Act') against respondent Nos.1 to 3, who are the driver, owner and insurer of the lorry bearing registration Nos.AAT-4779, for the death of Guguloth Kheema, who is the husband of the 1st petitioner and father of 2nd and 3rd petitioners, in a motor accident occurred on 29.04.2001.

3. Whereas, M.A.C.M.A. No.4042 of 2009 (latter appeal) is preferred by the appellant-3rd respondent (insurer), aggrieved by the award of compensation claimed of Rs.1,50,000/-, with proportionate costs and interest at 7.5% per annum from the date of petition till realisation, by the Tribunal, in M.A.T.O.P. No.1267 of 2001, filed under Section 166 of the Act against the same respondents, for the death of the daughter of the petitioners by name Boda Aruna in the same accident.

4. The case of the petitioners, in brief, is that on 29.04.2001 at about 23:00 hours when the deceased in the above two petitions along with

others were traveling by lorry to Korivi, to attend a function, 1st respondent, driver, drove the lorry at high speed in a rash and negligent manner and, when it reached Maddulapalli bus stage, the lorry went off the road and turned turtle. The petitioners in M.A.T.O.P. No.1270 of 2001, who lost their sole bread winner, filed the Petition seeking compensation of Rs.2,50,000/- for the untimely death of the deceased. Whereas, the petitioners in M.A.T.O.P. No.1267 of 2001, who lost their minor daughter aged 14 years, filed the Petition seeking compensation of Rs.1,50,000/-.

5. Respondents 1 and 2, who are the driver and owner of the lorry, remained *ex parte* before the Tribunal.

6. Respondent No.3, insurer of the lorry, filed counter denying the allegations of the petitions including the manner of accident, age and income of the deceased and called upon the petitioners to prove the valid driving license of the 1st respondent, at the time of the accident, and contended that the deceased were traveling by lorry, which is a goods vehicle, as gratuitous passengers, and as such the insurance policy of the lorry does not cover the risk of the deceased and, hence, prayed to dismiss the Petitions with costs.

7. The Tribunal clubbed both the Petitions and recorded evidence. The Tribunal, after framing issues including one additional issue, examining the 1st petitioner in both the Petitions as P.W.1 and Assistant Administrative Officer of the 3rd respondent-insurer as R.W.1; marking Exs.A-1 to A-4 and Ex.B-1 in both the Petitions; partly allowed the Petition in M.A.T.O.P. No.1270 of 2001 by granting a compensation of Rs.1,92,000/- and apportioned that the 1st petitioner is entitled for an amount of Rs.1,00,000/-, 2nd and 3rd petitioners are entitled for an amount of Rs.46,000/- each; whereas, allowed the Petition in M.A.T.O.P. No.1267

of 2001 by granting the compensation claimed of Rs.1,50,000/- and apportioned that each of the petitioner is entitled for an amount of Rs.75,000/-, as stated hereinabove.

8. The appellant, 3rd respondent (insurer), preferred these Appeals, separately, questioning that the quantum of compensation awarded by the Tribunal is excessive and exorbitant.

9. Heard Sri C. Prakash Reddy, learned standing counsel for the appellant-insurer, and Sri M. Ramalingeswara Reddy, learned counsel for the respondents-claim petitioners, in both the Appeals. M.A.C.M.A. No.1305 of 2006 against the 4th respondent, driver, was dismissed for default *vide* order of this Court on 28.06.2016. There was no representation on behalf of the 5th respondent, owner of the lorry, in M.A.C.M.A. No.1305 of 2006 and no representation on behalf of the respondents 3 and 4, driver and owner of the lorry, in M.A.C.M.A. No.4042 of 2009.

10. Learned standing counsel for the appellant-insurer submitted that while the deceased, mentioned hereinabove, along with others was traveling by the lorry to Korivi to attend a function at Korivi temple on 29.04.2001 at 23:00 hours, 1st respondent-driver of the lorry drove the same at high speed, in a rash and negligent manner, resulting in injuries to 40 persons and death of one Gogulath Ramesh @ Ravi including the deceased, mentioned hereinabove, who were traveling as gratuitous passengers by the lorry. Though there is valid insurance of the lorry on the date of accident, the risk of the deceased, and other persons who sustained injuries, is not covered under the policy, Ex.B-1. The Tribunal while determining the issues tagged the liability against the appellant-insurer, which is erroneous and submitted that the compensation awarded

in both the above petitions *i.e.*, Rs.1,92,000/- in O.P. No.1270 of 2001 and Rs.1,50,000/- in O.P. No.1267 of 2001 is excessive and ultimately prayed to set-aside the direction, in so far as pay and recover, issued against the appellant-insurer is concerned.

11. *Per contra*, learned counsel appearing on behalf of the respondents-claim petitioners contended that the Tribunal had awarded just and reasonable compensation. There are no violations of the terms and conditions of the insurance policy. The Tribunal had taken all these facts into consideration and, accordingly, directed the appellant-insurer to initially deposit the compensation awarded to the claim petitioners and, later, to recover the same from the 2nd respondent-owner of the lorry. There is no infirmity in the orders under Appeal and, ultimately, prayed to dismiss the Appeals relying on the decisions of this Court in M.A.C.M.A. No.87 of 2007, dated 12.03.2014, ***National Insurance Company Limited Vs. Smt. Zuleka Begum and others***¹ and ***New India Assurance Company Limited Vs. Voggani Chinna Venkataiah and others***².

12. In view of the rival contentions, raised on behalf of both the counsel, the following points have come up for determination:

- 1) Whether the compensation awarded by the Tribunal is excessive?
- 2) Whether the direction, in so far as pay and recover against the appellant-insurer, is liable to be set-aside?
- 3) To what result?

13. **POINT No.1:** For the death of deceased, namely, Goguloth Kheema, in O.P. No.1270 of 2001, who was stated to be aged 35 years

¹ 2015 (1) ALT 162

² 2015 (3) ALT 103

and earning Rs.3,000/- p.m. by doing coolie works, the claim petitioners claimed compensation of Rs.2,50,000/-. Basing on the oral and documentary evidence available on record, the Tribunal granted the compensation of Rs.1,92,000/-, by taking the income of the deceased as Rs.1,500/- p.m., relying on a decision of this Court in ***Penkey Konda Vs. Sorapalli Zedson Moses and others***³, Rs.18,000/- per annum and deducted 1/3rd towards his personal and living expenses, and applied multiplier '16', relying on II Schedule of the Act for the age group of 31 to 35 years and assessed the compensation on all scores as Rs.1,92,000/-, which is reasonable and just. Therefore, no other finding can be substituted.

14. For the death of deceased, namely, Boda Aruna, in O.P. No.1267 of 2001, who is aged 14 years, the Tribunal had taken the notional annual income of a non-earning person as Rs.15,000/- p.a. and deducted 1/3rd towards her personal and living expenses relying on a decision of this Court in ***K. Neelakanta Vs. Pathi Kottai Aghari Transport Corporation Limited, Vellore, Tamil Nadu***⁴, adopted multiplier '15', which is applicable up to the age group of less than 15 years teenagers, and granted the compensation claimed of Rs.1,50,000/- which is just and reasonable. This finding is based on evidence on record. No other opinion need be substituted.

15. Hence, the finding with regard to quantum of compensation awarded in both the Petitions, impugned herein, is liable to be confirmed and is, accordingly, confirmed.

16. **POINT Nos.2 and 3**: Both the points go together. As per the evidence placed on record, while the deceased Goguloth Kheema and

³ 2005 (4) ALT 144

⁴ 2004 (2) LS 305

Boda Aruna along with others were traveling by lorry, on an invitation by Banoth Parsya, to attend a function of his elder son's daughter's head tonsuring ceremony at Veerabhadra Swamy Temple, Korivi, which was scheduled to be held on 30.04.2001, due to the rash and negligent driving of its driver, met with the accident on 29.04.2001 at 23:00 hours, both the deceased herein and another succumbed to the injuries and 40 others sustained injuries. Admittedly, as per the evidence on record, the persons traveling by the lorry, as on the date of accident, are unauthorized passengers but not owners of the goods. It goes to show that the lorry was not used only for transportation of goods. Further, as per the evidence of R.W.1, the lorry is only a goods carrying commercial vehicle and no person is permitted to travel by it. But the respondents 1 and 2, who are the driver and owner of the lorry, flouting the terms and conditions of Ex.B-1, copy of insurance policy, permitted the deceased and other persons to travel by the lorry, which is totally against the terms and conditions of Ex.B-1 policy. The lorry was being used by both the deceased and others to attend a function at Korivi temple. The cooking material *etc.*, was being transported by the lorry at the time of the accident. This kind of travel by both the deceased and other persons in the lorry would not make them as owners of the goods. The liability of the deceased and others who traveled by the lorry is not covered under Ex.B-1 insurance policy. So, from the evidence of R.W.1, Ex.B-1 - insurance policy, and other criminal case record, it can be safely concluded that the deceased were only gratuitous passengers, who unauthorizedly traveled by the lorry.

17. In a decision of this Court in **Voggani Chinna Venkataiah²**, relied on by learned counsel for the respondents-claim petitioners, the point fell for determination was, whether the death of deceased, who was engaged

as a labourer on the tractor and trailer for transporting earth from a water tank bed to the fields of a village, did not occur while he was traveling by the tractor, but when he got down from the tractor to drink water and when he was trying to board the tractor, due to rash and negligent driving of its driver, on account of which he fell down and received injuries and died, wherein it was held that the death has to be treated as a death of third party and in such circumstances the insurer has a statutory liability under Section 147 read with Section 149 of the Act to indemnify the insured due to subsistence of valid insurance policy.

18. In **Smt. Zuleka Begum¹**, relied on by learned counsel for the respondents-claim petitioners, this Court held that a person who was traveling by sitting in the cabin of lorry, as owner of the cattle loaded therein, fell down from the lorry when its driver applied sudden brakes and thereafter the rear tyres of the lorry ran over him and caused his death, be treated as a death of third party but not as a death of gratuitous passenger and the insurer has to pay the compensation to the petitioners and then to recover it from the respondent-owner of the lorry.

19. In M.A.C.M.A. No.87 of 2007, relied on by learned counsel for the respondents-claim petitioners, it was held that when the deceased, who was sitting in the cabin on left side as an unauthorized passenger, from the jolting due to the rash and negligent driving of the lorry, lost grip and fell down under the lorry and he was crushed under the wheels; the moment he fell down, he lost the character of an unauthorized passenger and became a third party and later only he was run over. It is held that when once the deceased became a third party to the vehicle, a statutory liability is on the insurer to indemnify the insured under Section 147 read with Sections 149 and 168 of the Act and as such tagged that the insurer has to pay 50% of the compensation to the petitioners, insurer-owner has

to pay 25% of the compensation to the petitioners and tagged the remaining 25% on the deceased, due to his negligence; so the claim petitioners were not entitled to that extent.

20. In the instant case on hand, the facts and circumstances are quite different with the decisions relied on by learned counsel for the claim petitioners. The deceased herein were traveling by lorry, as gratuitous passengers, died due to the rash and negligent driving of the driver of the lorry. Therefore, deceased did not die in the accident as a third party. Therefore, the decisions relied on by the learned counsel for the respondents-claim petitioners are not applicable to the instant case.

21. At this stage, it is apt to refer the decisions of the Apex Court in ***National Insurance Company Limited Vs. Bommithi Subbhayamma and others***⁵, ***M.V. Jayadevappa and others Vs. Oriental Fire and General Insurance Company Limited***⁶, ***National insurance Company Limited Vs. Savitri Devi and others***⁷ and ***New India Assurance Company Limited Vs. Asha Rani and others***⁸, wherein the Apex Court overruled the law laid down earlier in ***New India Assurance Company Vs. Satpal Singh and others***⁹ and held that insurer of goods vehicle is not entitled to pay first the compensation awarded to the respondents-claim petitioners and then recover it from the respondent-owner. In the instant case, the finding of the Tribunal against the 3rd respondent-appellant-insurer, with regard to payment of the compensation awarded first to the claim petitioners and then recovering it from the 2nd respondent-owner of the lorry, is unsustainable, in view of the settled law laid down by the Apex Court *supra*, and such direction is liable to be set-aside.

⁵ 2005 ACJ 721 (SC)

⁶ 2005 (2) TAC 5 (SC)

⁷ 2013 (11) SCC 554

⁸ 2003 (2) SCC 223

⁹ AIR 2000 SC 235

22. As could be seen from the proceeding sheet on record, this Court on 26.06.2006, while admitting M.A.C.M.A. No.1305 of 2006, directed the appellant-insurer to deposit 1/3rd of the compensation amount awarded by the Tribunal with proportionate costs and interest; even by the very order, the claim petitioners 1 and 2 were only permitted to withdraw an amount Rs.20,000/- and Rs.10,000/- respectively and the balance amount was directed to be kept in a fixed deposit, in any nationalized bank, for a period of three years. Therefore, to the extent of amount withdrawn by the claim petitioners 1 and 2, if any, the appellant-insurer is at liberty to recover the same from the 2nd respondent, owner of the lorry, but not from the claim petitioners. The appellant-3rd respondent is entitled to withdraw the amount lying to the credit of the M.A.T.O.P. No.1270 of 2001, from the Tribunal. The respondents-claim petitioners are entitled to execute the impugned order against the 2nd respondent (owner of the lorry). Except this modification, the other conditions imposed by the Tribunal in M.A.T.O.P. No.1270 of 2001 are unchanged.

23. As far as M.A.C.M.A. No.4042 of 2009 is concerned, the amounts received by the respondents-claim petitioners, shall not recovered from them by the appellant-insurer. The appellant-insurer is entitled to recover the same from the 2nd respondent, owner of the lorry. The respondents-claim petitioners are entitled to execute the impugned order and decree in M.A.T.O.P. No.1267 of 2001 against the 2nd respondent-owner of lorry to recover the balance amount. Except this modification, the other conditions imposed by the Tribunal in M.A.T.O.P. No.1267 of 2001 are unchanged.

24. Accordingly, with the above direction, both the Appeals are allowed setting aside the orders and decrees under challenge to the extent of direction, against the appellant-3rd respondent to initially pay and recover

the same from the 2nd respondent-owner of the crime vehicle, while confirming the orders and decrees under challenge in all other aspects.

25. As a sequel, pending miscellaneous applications, if any, in these Appeals, shall stand closed. There shall be no order as to costs.

Dr. SHAMEEM AKTHER, J

Date:07.04.2017.
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HON'BLE Dr. JUSTICE SHAMEEM AKTHER

70



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M.A.C.M.A. Nos. 1305 OF 2006 & 4049 OF 2009

Date.07.04.2017

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