HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

M.A.C.M.A. 216 OF 2016

JUDGMENT :

The 3rd respondent-insurer aggrieved by the order dated 18.09.2015 in M.V.O.P.No.847 of 2011 maintained under Section 166 of the Motor Vehicles Act (for short 'the Act') by the five claimants no other than wife, major daughter, major son, minor daughter and minor son of late Ramachandra Rao for Rs.5,00,000/- against the driver, owner and insurer of the van bearing No.AP 31Y 3898, impugning the compensation awarded of Rs.10,00,000/- with interest at 7.5% p.a. from the date of petition till realization, maintained the appeal.

2. The contentions in the grounds of appeal are that the impugned order is contrary to law, weight of evidence and probabilities of the case and erroneous and should have seen that there is no liability to pay compensation; the van involved in the accident is, in fact, a goods carriage including as per B-Register covered by Ex.X2 besides evidence of RWs.3 to 5 produced Exs.B1 to B4 and the deceased was travelling as unauthorized passenger at the time of accident and there is violation of terms of the policy-Ex.B2, there from, the Tribunal having observed that the deceased was not travelling as owner of the goods, gravely erred in saddling with liability on the insurer of pay and recovery, which is contrary to law and against

the settled expressions of the Apex Court in National Insurance Company Ltd., v. Bommiti Subbayamma (2005 ACJ 721), M.V.Jayadevappa v. Oriental Insurance Company Ltd.(2005 ACJ 1801), New India Ssurance Company Ltd. v. Vedwathi(2007 ACJ 1043), T.O.Sangeeta v. Oriental Insurance Company Ltd.(2008 ACJ 6), National Insurance Company Ltd., v. Prema Devi(2008 ACJ 1149) and National Insurance Company Ltd., v. Kaushalaya Devi (2008 ACJ 2144); that the Tribunal failed to see the directions of pay and recovery cannot be applied to the facts of the case, for unauthorized passenger of a goods vehicle as also held by the Apex Court in National Insurance Company Ltd., v. Parvathaneni (2009 (8) SCC 785) and that the discretionary power to give relief under Articles 141 and 142 available to the Apex Court and not to the High Courts to pass any pay and recovery orders in such cases of unauthorized passenger of goods vehicles and the Apex Court's expression in National Insurance Company Ltd., v. Choleti Bharatamma (2008 (1) SCC 423) also reiterates the same. The further contest is that the deceased worked as R.M.P doctor and earning Rs.15,000/- p.m. as per the self-serving evidence of PWs.1 and 3, however, in the cross examination, PW.3 admitted of he does not know whether the deceased was income tax assessee or not and the Tribunal erred in taking the earnings of the deceased at Rs.5,000/- p.m. with no basis and PW.1 admitted that the deceased was not an income tax assessee and they hold white ration card and thereby should not have been taken earnings at Rs.5,000/- p.m. in the absence of substantiating the same. The further contest is that as respondent No.2 is a married daughter and respondent No.3 is a major son of the deceased, they are not entitled to claim compensation, much less, to count as dependents and awarding compensation of Rs.1,00,000/- towards loss of estate, Rs.1,00,000/- towards loss of care and guidance are unsustainable and awarding of Rs.10,00,000/- against the claim of Rs.5,00,000/- is also unsustainable and granting of 7.5% p.a. interest is not tenable. Hence, the award of the Tribunal for pay and recovery is liable to be set aside.

3. The learned counsel for the appellant-insurer reiterated the same in the course of hearing.

4. Whereas, it is the submission of the learned counsel for respondents 1 to 5 that the award of the tribunal holds good and for this Court while sitting in the appeal, there is nothing to interfere. Respondent Nos.6 and 7, who are no other than driver and owner of the vehicle even served failed to attend in the appeal and hence, taken as heard. Perused the material on record.

5. Before the Tribunal, it is the claim from the claim petition averments that the deceased used to work as R.M.P. doctor and also doing sandy business in and around Narsipatnam agency villages and earning Rs.25,000/- p.m. and was aged about 50

years and on 02.09.2010 at 6.00 a.m. he boarded the crime van bearing registration No.AP 31Y 3898 at Narsipatnam and when it reached Singarbha bridge at about 10 a.m., due to the rash and negligent driving of the driver/respondent No.1, the van turned turtle and the deceased died instantaneously and other passengers also received injuries and subsequently, one more passenger breathed the lost.

6. The counter filed by respondent No.2, owner of the vehicle is that the insurance policy is in force and the driver got valid driving license. The deceased was travelling as owner of goods and the insurer is liable to pay compensation.

7. The contest of the insurance company is that the deceased along with other persons was travelling in the goods vehicle as unauthorized passenger and the insurer is not liable to pay compensation apart from other contentions of the manner of accident, age and earnings of the deceased are false and the claim petition is liable to be dismissed against the insurer-respondent No.3.

8. In the course of hearing, on behalf of the petitioners/claimants, PWs.1 to 3 were examined and Exs.A1 to A25 were marked and on behalf of respondent No.3-insurer, RWs.1 to 5 were examined and Exs.B1 to B4 were marked and on X-series, Exs.X1 and X2 were marked.

9. The evidence of PW.1, who is petitioner No.3 and major son of the deceased is that the deceased was travelling as owner of the goods in the goods vehicle at the time of accident and in support of the said contention, he denied the suggestion of the deceased was not travelling as owner of goods. He admitted that his father along with them got the white ration card showing low income group and denied the suggestion that the deceased was aged 65 years.

10. In the claim petition, it is mentioned specifically that the deceased was conducting sandy business besides R.M.P. doctor. No doubt, the claim petition is silent as to the nature of goods transported in the vehicle and quantum of goods and how other persons were travelling in the van in question. The claim petition is also silent as to any goods damaged and if so what is the claim for it. Ex.B1 is the attested copy of the trip sheet. The name of the deceased and another person mentioned therein and at column No.4 it shows tomatoes, potatoes, green chillies and onions were the goods transporting.

11. Respondent No.2-owner of the vehicle was examined as RW.1. He exhibited trip sheet. Ex.B2 is the policy. Ex.X2 is the extract of the vehicle showing it is a goods vehicle. PW.2 is the so called eye witness so also PW.3. RW.4 is the Senior Assistant in RTA Office exhibited Ex.X2-B-register showing the vehicle in question is a goods vehicle with seating capacity of three for driver, owner and cleaner and passengers are not permitted to

travel in the said vehicle as per Ex.X2. According to RW.3, as per Ex.B2-policy there is no place for owner of the goods to travel. It is there from, the tribunal held that the deceased was an unauthorized passenger and not owner of the goods, however, in saying the insurer is liable to pay and recover.

12. There is no cross appeal filed by the claimants against the said finding of unauthorized passenger or the finding of pay and recovery instead of any claim of ordering for payment without any pay and recovery liability. The owner also not filed any cross appeal, much less, an independent appeal. Thus, as per the expressions of the Apex Court in Ranjana Prakash V. Divisional Manager[1], without cross objections, though the claimants and other parties cannot claim higher relief in an appeal what was the relief granted they are entitled unless reversed on merits by the appellate Court. From this proposition, coming to the facts, the evidence of RWs.1 to 5 no way shows how EX.B1-trip sheet and RW.1 evidence is false. Once it supports the evidence of PWs.1 to 3 including the 3rd claimant-PW1 (son of the deceased) that the deceased was travelling as owner of the goods, even besides the deceased there are two persons including the deceased in the cabin and the goods mentioned in the trip sheet as load of vegetable bags, that establishes in support of the claim with reference to the evidence of PWs.1 to 3 and RW.1 of the deceased was owner of

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[1] 2011)(8) Scale-240

the goods. It shows there is another death and some more persons travelling on the top of the vehicle, if any sustained injuries, to say, there are more than two persons travelling in the vehicle either by sitting in the cabin or on the top of the load of the vehicle. In fact, if there is no seating capacity, the owner of the goods is entitled to travel in a goods vehicle and even from the expression of the Apex Court in Cholleti Bharatamma (supra), the owner of the goods if travelling by sitting on the cabin is entitled to compensation. From this, it establishes that the deceased is, in fact, owner of goods in the goods vehicle with seating capacity of driver, cleaner and another person, who is owner of the goods. Ex.X2-B-Register extract with reference to the evidence of PW.3 establishes the seating capacity is three, leave about others even unauthorized at best if there is any other claim so far as one person as owner of goods, the deceased can be considered for others to claim apportionment to the extent of there was claim, the insurer is liable for the highest of the claim amounts as per the principle laid down by the Apex Court in N.I.C. v. Anjana Shyam[2]

13. From the above facts, now coming to the quantum of compensation, the earnings of the deceased claimed at Rs.25,000/- p.m. is with no basis, that too, when only white ration card holder and not only working as R.M.P.doctor, but also, doing sandy business, sale of vegetables etc., When the

[2] 2007(7) SCC 445

sandy business is on weekly basis in the area of Narsipatnam agency villages, from there is nothing to disbelieve for a R.M.P. have no such professional standards of practice commanding to it any sandy business is not a bar.

14. Now coming to the earnings of the deceased concerned, even as per the expression of the Apex Court in Lata Wadhwa V State of Bihar[3], in the absence of proof of earnings for the claim under Section 166 of the Act, the minimum to be taken is Rs.3,000/- p.m. and with proportionate increase to the date of accident i.e., 02.09.2010, about nine years later, it can be taken at Rs.4,000/- p.m. and from the age shown as per the Ex.P2-Post Mortem report and the claim petition of above 50 years with 10% increase therein it comes to Rs.4,400/- p.m. and Rs.52,800/- p.a. and among five claimants, but for two minor children, the married daughter and major son are not dependents, thereby, if 1/3rd is deducted towards personal expenses of the deceased, it comes to Rs.35,200/-p.a. and the multiplier taken by the tribunal is '13' as per Sarla Verma v Delhi Transport Corporation[4]. Accordingly, if the same is calculated, it comes to Rs.4,57,600/- (Rs.35,200/- x 13). Apart it from it, as per the latest five Judge Bench expression of the Apex Court in National Insurance Company Ltd., v. Pranay Sethi[5], the claimants are entitled to Rs.15,000/- towards loss of

[3] AIR 2001 (SC) 3218
[4] 2009 ACJ 1298.
[5] 2017(3) LS 4 (SC) = JT 2017 (10) SC 450

estate, Rs.15,000/- towards funeral expenses and Rs.40,000/- towards consortium to the 1st claimant. Thus, the total compensation comes to Rs.5,57,600/-.

15. Accordingly, the appeal is partly allowed by reducing the compensation from Rs.10,00,000/- to Rs.5,57,600/-. Out of the said compensation, first claimant is entitled to 30%, the claimants 4 and 5 are entitled to 25% each and claimants 2 and 3 are entitled to 10% each. Since there are no cross objections either by the insurer or by the claimants, once appeal is at large against correctness of findings, the appellate Court can interfere with the liability of pay and recovery is unsustainable, thereby, setting aside the pay and recovery liability holding that the insurer is liable to pay compensation indemnifying the owner. If there are other claims, it is left open to seek Anjana Shyam (supra) principle for insurer no more liable.

16. Consequently, miscellaneous petitions, if any, pending shall stand closed. There is no order as to costs.

Dr. B. SIVA SANKARA RAO, J

Date: 30-11-2017
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