9HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A.No. 1262 OF 2010

<u>JUDGMENT</u>:

1. The appellant/Insurance Company aggrieved by the Award and decree dated 06.01.2010 passed in OP.NO. 24 of 2008 by the learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-III Additional Chief Judge, City Civil Courts, Hyderabad preferred this appeal mainly on the grounds that the accident occurred due to rash and negligence of the deceased himself who negligently crossed the road without observing the traffic and taking minimum care on N.H.9 and hence the finding of the Tribunal that the Insurance Company is jointly and severally liable to pay the compensation is illegal and without considering the material on record.

The driver of the auto possessed only auto rickshaw non-transport driving licence; as such he is not competent to drive the auto rickshaw transport and that the fourth respondent herein who was the owner of the auto knowing that the driver is not competent to drive the vehicle entrusted the same to him and thereby violated the terms and conditions of the policy; as such, the appellant/Insurance Company is not liable to pay any compensation. The Post Mortem Examination Report and Charge Sheet are not authenticated documents to support the age of the deceased. It is further contended that the observation of the Apex Court to pay and recover is mode or procedural step for immediate payment of money and it cannot be construed as proposition of law as the said order was issued within the domain of Article 142 of the Constitution of India. .

2. On the other hand, respondents 1 to 3/claimants contended that the driver of the auto was permitted to drive the auto rickshaw transport vehicle as the gross weight of which was less than 7500 Kgs. It is further contended that in the absence of evidence with regard to age, income and occupation, the Tribunal based on the material available on record can consider to construe the age, income and occupation of the deceased. There is no error in ordering 'pay and recover' which is immediate relief to the beneficiaries under the MV Act.

3. Brief case of respondents 1 to 3/claimants is that one G.Gangaram, who is the husband, father and son respectively of respondents 1 to 3 herein/claimants, while proceeding by walk in front of Goutham Model School at Hanuman Nagar, Dilsukhnagar, Hyderabad on 27.8.2007 at about 11.30 AM, the auto rickshaw bearing No. AP 11X 4408 being driven in rash and negligent manner at High speed, dashed him, as a result of which, he sustained grievous injuries and died on the spot.

The deceased was hale and healthy, aged bout 35 years, working as decorator and used to earn Rs.3,300/- per month. Respondents 1 to 3/claimants were dependants on the income of the deceased and due to sudden death, they lost their bread winner and suffered mental agony.

4. Before the Tribunal, owner of the auto rickshaw bearing No.AP 11X 4408 remained ex parte. The appellant/Insurance Company filed counter inter alia stating that the accident occurred due to the negligence of the deceased himself; that there was no rash and negligence on the part of the driver of the said auto and that the compensation claimed by the claimants is on higher side.

5. Based on the pleadings of the rival parties, the Tribunal framed the following issues for settlement.

1. Whether the deceased died in the accident on 27.8.2007 due to rash and negligent driving of the driver of Auto rickshaw bearing No.AP 11X 4408 ?
2. Whether the petitioners are entitled to any compensation? If so from whom ?
3. To what relief ?

6. In order to prove the respective claims, on behalf of claimants, P.Ws.1 and 2 were examined and Exs.A.1 to A.4 were got marked. On behalf of the appellant/Insurance Company and fourth respondent, R.Ws.1 and 2 were examined and Exs.B.1 to B.5 and X.1 were got marked.

<u>POINT</u>:

Now the points that arise for determination are:

(i) *Whether the driver of the auto rickshaw who possessed non transport Light Motor Vehicle driving licence is competent to drive transport auto rickshaw*;

(ii) *Whether the fourth respondent herein/owner of the auto rickshaw violated the terms and conditions of the policy*, *(iii) Whether there is negligence on the part of the deceased himself, and*

(iv) Whether the Tribunal erred in ordering 'pay and recover'.

7. Smt. G.Yellamma, first claimant herself was examined as P.W.1. Her unimpeachable evidence is that she is the wife of the deceased. Second claimant is their daughter and third claimant is the mother of the deceased. Though PW.1 was cross examined at length with regard to relationship between the claimants and deceased, nothing adverse was elicited by the Insurance Company. During the cross examination, P.W.1 is clear in her evidence and she specifically deposed that she is the wife of the deceased and second claimant is their daughter and third claimant is the mother of the deceased. The suggestion to P.W.1 is that the claimants have not filed any legal heir certificate showing their relationship.

Absolutely there is no rebuttal evidence eventhough the appellant/Insurance Company has taken plea that the claimants are not the dependants of the deceased G.Gangaram and gave suggestion that they are not wife, daughter and mother respectively of the deceased. It could not adduce any rebuttal evidence in regard thereto. In the Inquest Report under Ex.A.2, P.W.1 is shown as wife of the deceased. Therefore the unimpeachable evidence of P.W.1 supported by Ex.A.2 clinchingly proved and established that P.W.1/first claimant is the wife of the deceased, second claimant is their daughter and third claimant is the mother of the deceased.

8. With regard to rash and negligence, admittedly P.W.1 in her chief affidavit reiterated the pleadings of the claim petition. During the cross examination, she clearly stated that she was not the eye witness to the accident. Therefore there remains only the evidence of P.W.2 who is the eye witness to the accident.

9. The consistent evidence of P.W.2 is that at the time of accident, he was travelling from Ranigunj to Dilsukhnagar. The accident occurred at Saroornagar cross road. At the relevant point of time, he witnessed the accident from a distance of about 15 to 20 meters. While the deceased was crossing the road by walk, the driver of the auto bearing No. AP 11X 4408 drove in rash and negligent manner, at high speed and dashed him. It is elicited by the Insurance company during the cross examination that the said auto was proceeding from Koti to Dilsukhnagar side and at the spot where the deceased was crossing the road, there is a road divider and it is a NH.9 road where there was heavy traffic. So while crossing the road, the pedestrian would certainly observe the movement of vehicles from both sides and when it is clear, then only try to cross the road. The driver of transport auto rickshaw vehicle on NH.9 should have more careful and caution.

Ex.A.1 is the copy of FIR wherein the complainant clearly asserted that on 27.08.2007 at about 11.30 am near Hanuman nagar on NH.9, while the deceased crossing the road near Gowtham Model School, the auto bearing No.AP 11X 4408 while proceeding from Dilsukhnagar to Kothapet side in rash and negligent manner, at high speed, dashed the deceased. The Investigating Officer after thorough investigation filed charge sheet vide Ex.A.4 against Ramavath Bodya Naik, driver of the auto alleging that while the deceased Gangaram crossing the road in front of Gowtham Model School, Dilsukhnagar, the driver of auto bearing No.AP 11X 4408 being driven in rash and negligent manner, at high speed, dashed G.Gangaram, resulting which, he suffered bleeding injuries and died on the spot.

In view of the circumstances stated herein above and marshalling the facts. I am of the considered view that since it is NH.9, the driver of the crime auto should have observed the traffic on the road while proceeding with transport auto rickshaw vehicle and should have driven the vehicle with more care and caution. The pedestrian while crossing the road, would observe the traffic on both sides and then start to cross the road. Though the appellant/Insurance Company took plea that the there was no rash and negligence on the part of the driver, it did not choose to produce any independent evidence to rebut the evidence of P.W.2 and Exs. A.1 and A.4. R.W.1 was the Senior Executive of the appellant Insurance Company and R.W.2 was the Senior Assistant in RTA office, Uppal, Hyderabad. Both R.Ws. 1 and 2 are not the eye witnesses to the accident and therefore their evidence is of no use for consideration with regard to rash and negligence on the part of the deceased.

In such circumstances, I am of the view that the Tribunal having categorically considered the evidence of P.W.2 and supported evidence at Exs.A.1 and A.4 and in the absence of any rebuttal evidence, came to the right conclusion that the accident occurred due to rash and negligent driving of the driver of auto bearing No. AP 11X 4408. The appellant/Insurance Company failed to establish any negligence on the part of the deceased. As such, the said finding of the Tribunal, which is corroborated and supported by documentary evidence, is legal, valid and do not suffer from any legal infirmities warranting interference.

10. Further the contention of the appellant/Insurance Company is that the driver did not possess valid and effective driving licence at the time of accident and that the fourth respondent herein who was the owner of the vehicle entrusted the same having knowledge that the driver did not possess valid and effective driving licence and thereby violated the terms and conditions of the policy.

There is no dispute that the fourth respondent herein/first respondent in OP was the owner of the auto bearing No. AP 11X 4408 and admittedly even from the evidence of R.W.1, the said auto was insured with the appellant/Insurance Company under Ex. B.1 policy, which was in force with effect from 14.10.2006 to 13.10.2007, whereas the accident occurred on 27.8.2007 at 11.30 AM. Accordingly Ex.B.1 policy was in force as on the date of accident and the said auto was insured with the appellant/Insurance Company. These facts are no in dispute.

In the case of ***MUKUND DEWANGAN Vs ORIENTAL INSURANCE COMPANY LIMITED AND OTHERS*** {(2016) 4 SCC

298} the Apex Court held that various types of vehicles are defined separately in MV Act, 1988 which Act also distinguishes vehicles on the basis of their usage, transport and non-transport. The transport vehicles are further classified on the basis of their carrying capacity and weight. Transport vehicles are further classified and MV Act 1988 separately defines public service vehicles, goods carriage, educational institution bus and private service vehicles. Prior to 1994 Amendment, Section 10 separately provides for classes of vehicles and as per Section 10(2)(e) to 10(2)(h), transport vehicles were included under the Act under the category of 'light motor vehicle', 'heavy motor vehicle' etc as per gross vehicle weight or unladen weight as the case maybe. Section 2(21) deals with class of light motor vehicle which includes a transport vehicle or omnibus, the gross vehicle weight of either of which should not exceed 7500Kg. After amendment in 1994, there was no change with respect to the transport vehicles of class of light motor vehicle as defined in Section 2(21) of the MV Act 1988. In ***ASHOK GANGADHAR MARATHA Vs ORIENTAL INSURANCE COMPANY LIMITED*** {(1999)6 SCC 620} and other decisions, the view taken is that when the driver is holding licence to drive light motor vehicle, he is competent to drive transport vehicle of that category; whereas in ***NEW INDIA ASSURANCE COMPANY LIMITED Vs PRABHU LAL*** {(2008) 1 SCC 696} the view taken is that before 2001 also it was necessary for a driver possessing licence to drive light motor vehicle to obtain endorsement to drive transport vehicle of that category; whereas in ***NATIONAL INSURANCE COMPANY LIMITED. Vs. ANNAPPA IRAPPA NESARIA*** { (2008) 3 SCC 464} the Apex Court laid down that before

28.3.2011 there was no necessity for holder of licence to drive light motor vehicle to have endorsement to drive transport vehicle; whereas in ***NEW INDIA ASSURANCE COMPANY LIMITED Vs. ROSHANBEN RAHEMANSHA F***AKIR {(2008) 8 SCC 253} and ***ORIENTAL INSURANCE COMPANY LIMITED Vs ANGAD KOL*** {(2009) 11 SCC 356} the view taken is that it is necessary for the holder of light motor vehicle licence to obtain specific endorsement on licence to drive transport vehicle of the light motor vehicle weight as provided in Section 2(41) thereof.

Thus there appears to be conflict in the decisions of the Apex Court with respect to the pre-amended position and also after amendment has been effected in the forms in 2001. Further it is to be seen, whether 'transport vehicle' and 'omnibus' the 'gross vehicle weight' of either of which does not exceed 7500 kg would be a 'light motor vehicle' and also motor car or tractor or a roadroller, 'unladen weight' of which does not exceed 7500 Kg and holder of licence to drive class of 'light motor vehicle' as provided in Section 10(2)(d) would be competent to drive a transport vehicle or omnibus, the 'gross vehicle weight' of which does not exceed 7500 Kg or a motor car or tractor or roadroller, the 'unladen weight' of which does not exceed 7500 Kg ? In view of the conflicting views, the matter was referred to a larger Bench.

As the matter stood thus, in ***NEW INDIA ASSURANCE COMPANY LIMITED Vs. ROSHANBEN RAHEMANSHA FAKIR*** {(2008) 8 SCC 253} and ***ORIENTAL INSURANCE COMPANY LIMITED Vs ANGAD KOL*** {(2009) 11 SCC 356} the view taken is that it is necessary for the holder of light motor vehicle licence to obtain specific endorsement on licence to drive transport vehicle of the light motor vehicle weight as provided in Section 2(41) thereof. But in the instant case, the evidence of R.W.2 is that the driver of the offending vehicle AP 11X 4408 possess only non-transport Light Motor Vehicle driving licence. But he did not possess requisite licence to drive transport Light Motor Vehicle. Ex.B.5 is the vehicle check report issued after examining the offending vehicle whereunder against Column No.7, it is mentioned '*Driving licence without transport endorsement and PSV badge*'.

To substantiate the same, the Insurance Company issued notice to the owner of the offending vehicle to furnish the particulars of policy, date, time and place of accident, particulars of deceased, name of the driver and particulars of the driving licence. R.W.1 deposed that the owner of the offending vehicle did not respond to its notice. Further, to substantiate the above, the Insurance Company summoned and examined the Senior Assistant in RTA office, at Uppal, Hyderabad who deposed that they have issued driving licence to R.Bodeya driver of the offending vehicle which is a Auto rickshaw non-transport driving licence and he is not competent to drive auto rickshaw transport. The Insurance Company also obtained Ex.B.2 through RW.1. The Senior Assistant of RTC (RW.2) produced Ex.X.1 extract of driving licence. Ex.B.2/ Ex.X.1 goes to suggest that R.Bodeya was issued driving licence of non-transport vehicle on 28.03.2007, which was valid upto 27.03.2027 and he is competent to drive auto rickshaw non transport. There is no specific endorsement to drive auto rickshaw transport though the unladen weight of both transport and non transport LMV should not exceed 7500 Kgs. During the cross examination, R.W.2 stated that he do not know the unladen weight of auto rickshaws transport as well as non transport. He admitted that one can get non transport driving licence converted as transport driving licence from other office also. But the owner of the offending vehicle/fourth respondent herein having received notice vide Ex.B.3 vide postal acknowledgment Ex.B.4 for furnishing mandatory particulars of policy, date, time and place of accident, particulars of deceased and the name of driver of auto bearing AP 11 X 4408 and particulars of driving licence, did not respond to the same. The Insurance Company by issuing notice vide Ex.B.3 discharged its legal obligation. Absolutely there is no material on record to establish that the driver obtained an endorsement on Ex.B.2/Ex.X.1 driving licence to drive auto rickshaw transport. More so, in the check report Ex.B.5, Motor Vehicle Inspector specifically mentioned that '*Driving Licence without transport endorsement and PSV badge*'.

In view of the facts stated hereinabove and marshalling the facts on the issue and on elaborate discussion of evidence of RWs.1 and 2 and documentary evidence vide Ex. B.1,B.2/X.1, B.3 to B.5, I am of the considered view that the Tribunal having considered the evidence on record found that the driver of the offending auto possesses driving licence of LMV non transport where as crime vehicle is auto rickshaw transport.

11. Further it was observed that liability has to be fastened on the owner for not taking reasonable care in employing the driver possessing valid driving licence and Insurance Company cannot be made liable to pay compensation, but as a special case Insurance Company which paid the amount was directed to recover the amount from owner of the offending vehicle in order to avoid second round of litigation.

Admittedly the Tribunal keeping in view the principle laid down in ***NATIONAL INSURANCE COMPANY LIMITED Vs. SWARAN SINGH*** { 2004 ACJ 1}, ***LAL CHAND Vs. ORIENTAL INSURANCE COMPANY LIMITED*** {2006 ACJ 2161}, ***UNITED INDIA INSURANCE CO. LTD., REP. BY ITS DIVISIONAL MANAGER,Vs. SMT. DHULIPALLA PRAMEELA DEVI W/O LATE DHULIPALLA VEERAIAH CHOUDARY AND ORS*** { 2007(1)(ALT 107 (DB)} that the insurer will not be allowed to avoid its liability merely on technical breach of conditions concerning the driving licence held that there is no force in the contention of the Insurance Company in regard thereto. Under these circumstances the Insurance Company cannot escape from its liability merely on technical breach of conditions concerning driving licence. Admittedly the fourth respondent herein being the owner of the offending auto rickshaw, and the appellant/Insurance company being its insurer, are jointly and severally liable to pay compensation. However, the appellant/Insurance Company is entitled to recover the amount from the owner of the offending vehicle/R.4 herein. In view of the facts and circumstances discussed above, since the dispute relating to possessing of driving licence of LMV of various types was referred to

Larger Bench as per the decision in MUKUND DEWANGAN (supra), as of today, the existing rule of law is that the holder of light motor vehicle licence has to obtain specific endorsement on licence to drive transport light motor vehicle as provided in Section 2(41) of MV Act. In the instant case, there is no endorsement on the licence Ex.B.2/Ex.X.1 to drive LMV of transport though unladen weight of which should not exceed 7500 Kgs. As per the settled law, the driver of the offending vehicle should possess specific endorsement on the driving licence to drive LMV of transport. The fourth respondent herein being the owner of the offending vehicle entrusted the vehicle to the driver who did not possess the valid and effective driving licence as he did not obtain specific endorsement to drive LMV of transport and thereby violated the terms and conditions of policy. Consequent thereto, the appellant Insurance Company is absolved from its liability to pay compensation and the fourth respondent/owner of the offending vehicle is liable to pay the compensation. Therefore the finding of the Tribunal that the appellant Insurance Company and Respondent No.4 owner of the offending vehicle are jointly and severally liable to pay compensation is set aside.

12. The fourth respondent, owner of the offending vehicle is vicariously responsible for the acts of the driver since he violated the terms and conditions of the policy by entrusting the vehicle to him (driver) who did not possess valid and effective driving licence to drive auto rickshaw transport. However, in view of Ex.B.1 policy was in force as on the date of accident on 27.8.2007 and considering that

the claimants are poor and MV Act is a beneficial legislation, the Insurance Company will pay the compensation to the claimants in the first instant and recover the same from the owner of the offending vehicle treating the judgment itself as a decree.

13. With regard to the compensation, the contention of the appellant/Insurance Company is that without any proof of age of the deceased, the Tribunal considered his age at 35 years which is illegal.

The consistent evidence of P.W.1 is that as on the date of accident, the deceased was aged 35 years. During the cross examination, P.W.1 admitted that she did not produce any document showing age, occupation and income of the deceased. In those circumstances, it is necessary for the Tribunal/Court to rely on the documentary evidence available on record. In Ex.A.1 copy of FIR, which is the earliest report submitted immediately after the accident at 1700 hours of 27.08.2017, i.e. on the same day, the age of the deceased is noted as 35 years. In Exs.A.2 and A.4 also, the age of the deceased was noted as 35 years and his occupation is noted as decorator though originally he belongs to Dhobi community.

In the absence of documentary evidence by P.W.1, the Tribunal is perfectly right in considering the oral evidence of P.W.1 and supported documents vide Exs. A.1, A.2 and A.4 wherein the age of the deceased was mentioned as 35 years. In the claim petition, P.W.1 mentioned that the deceased is aged 35 years. In the absence of any rebuttal evidence, the Tribunal is perfectly right in considering the age of the deceased as 35 years as on the date of accident.

14. Further, the inquestdars under Ex.A.2 stated that G.Gangaram died on the spot due to head injury suffered in the accident. The doctor who conducted post mortem examination on the dead body of the deceased opined that the cause of death was due to multiple injuries. In the charge sheet Ex.A.4 as well as Ex.A.1-FIR and Ex.A.3 Post mortem examination and in the oral evidence of P.Ws. 1 and 2, there is specific assertion that immediately after sustaining the bleeding multiple injuries in the accident, he succumbed to injuries on the spot itself. Thus there is nexus between the death and accident.

15. Now coming to the evidence of P.W.1 who deposed that the deceased used to earn Rs.3,300/- per month working as a decorator. No documentary evidence was adduced to substantiate the same. The Tribunal considering the material on record and decision of this Court in ***P. YESODHAMMA AND ORS Vs. T.BUCHI REDDY AND ORS*** {2006 ACJ 414) wherein it was held that when there is no income proof, the daily income of victim person can be taken as Rs.100/- in assessing the loss of earnings, assessed the income of the deceased at Rs.3000/- per month or Rs.36000/- per annum. Out of the said earnings, it deducted 1/4th towards personal living expenses had he been alive and arrived at Rs.2000/- per month or Rs.24,000/- as family contribution. Relying on the decision of the Apex Court in ***SARLA VARMS AND ORS Vs. DTC*** {2009 ACJ

1298}, since the deceased is aged 35 years, it applied the multiplier '16' and arrived at Rs.3,84,000/- as loss of dependency. Besides that, the Tribunal awarded Rs.14,000/- towards loss of consortium. In total, the Tribunal awarded compensation of Rs.3,98,000/-.

Though the compensation towards loss of estate and funeral expenses was not awarded by the Tribunal, since the appeal being preferred by the Insurance Company and there being no cross appeal or cross objections by the claimants, the compensation awarded by the Tribunal at Rs.3,98,000/- is confirmed without interfering with the same.

16. Similarly the apportionment of the compensation among the claimants and award of interest at 7.5% per annum from the date of petition till the date of deposit or realization are also confirmed. It is also confirmed regarding permitting of the claimants 1 and 3 to withdraw their share amount and directing to keep the share of second claimant being minor in FDR of any nationalized bank as they require no modification.

17. As discussed supra, the finding of the Tribunal that appellant/Insurance Company and fourth respondent, owner of the offending vehicle are jointly and severally liable to pay compensation is set aside while holding that the fourth respondent herein is liable to pay the compensation. However considering the MV Act being beneficial legislation and claimants are poor and they lost their bread winner in the motor vehicle accident, the appellant/Insurance Company shall immediately deposit the total compensation with

interest at 7.5% per annum from the date of petition i.e. 10.12.2007 till the date of deposit, after deducting the amount if any already paid or deposited, within forty five (45) days from the date of receipt of a copy of this judgment and thereafter, it shall recover the same from the fourth respondent herein/owner of the offending vehicle.

18. For the foregoing discussion, the appeal is partly allowed setting aside and modifying the Award and decree dated 06.01.2010 passed in OP.NO. 24 of 2008 by the learned Chairman, Motor Vehicle Accident Claims Tribunal-cum-III additional Chief Judge, City Civil Court, Hyderabad to the extent indicated herein above.

19. Advocate fee is fixed at Rs.2,500/-.

20. Miscellaneous petitions pending consideration if any in the appeal shall stand closed in consequence. There shall be no order as to costs.

JUSTICE N. BALAYOGI

DATED 6TH MARCH, 2018.
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