

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE N.BALAYOGI

M.A.C.M.A. Nos.685 and 1233 of 2006

COMMON JUDGMENT : (per the Hon'ble Sri Justice N.Balayogi)

The appellant in M.A.C.M.A.No.685 of 2006 is the claimant and the appellant in M.A.C.M.A.No.1233 of 2006 is the New India Assurance Company Limited.

2. The appellants in both appeals aggrieved by the Award and Decree in O.P. No.493 of 1999 dated 18.1.2006 on the file of the Motor Vehicle Accident Claims Tribunal-cum-V Additional District Judge, Vijayawada, awarding Rs.12,87,000/- with interest at 7.5% per annum from the date of the petition till the date of realization against respondents jointly and severally, preferred these appeals.

3. The contention of the appellant in M.A.C.M.A. No.685 of 2006 is that the Tribunal failed to consider that the appellant late Koka Dindikeswara Rao was initially admitted in the Primary Health Center, Pimpalgaon and later shifted to Civil Hospital, Nasik, where he took treatment from 29.8.1998 to 1.10.1998, thereafter shifted to NIMS, Hyderabad and was inpatient there from 2.10.1998 to 28.10.1998 and underwent surgery for spinal cord D11 to L1. Subsequently, he was admitted in Nagarjuna Hospital, Vijayawada on 20.11.1998

and took treatment under P.W.2 as inpatient from 20.11.1998 to 5.12.1998 and again undergone surgery for extra dural compression D11 – D12 with flaccid paraplegia. But, the Tribunal failed to appreciate the evidence on record in addition to bunch of vouchers, surgical bills and hospital bills. The Tribunal failed to consider the medical expenses, claim of Rs.2,00,000/-, Ex.A7 – hospital bills for an amount of Rs.1,38,929/- and further failed to see that the appellant incurred Rs.10,000/- towards transportation to the hospital and Rs.20,000/- towards damages to clothing and articles.

It is further contended that the Tribunal failed to see that the minimum wages were paid to the cook Nirmala Kumari and P.Hemantha kumar for attending the natural needs of the appellant. The Tribunal also failed to see that the appellant depends upon water beds and use urine catheter through out his life which was not considered and failed to award Rs.4,10,400/- as claimed.

It is further contended that the Tribunal failed to grant compensation for mental shock and agony and also failed to grant compensation of Rs.2,00,000/- for pain and sufferance. The Tribunal also failed to consider the claim for loss of earning of Rs.19,59,552/- and also failed to grant medical expenses of Rs.2,00,000/-.

4. The appellant - Insurance Company in M.A.C.M.A. No.1233 of 2006 *per contra* contended that the award is

highly excessive. The Tribunal failed to see that the driver was not having valid driving licence. It is further contended that the Tribunal applied higher multiplier and ought to have granted interest at 6% per annum.

5. The claim of the claimant/appellant K.Dindikeswara Rao in M.V.O.P. No.493 of 1999 is that the claimant, aged 46 years, was an employee in South Central Railway working as Head Train Ticker Examiner, Kazipet Headquarters drawing a monthly gross salary of Rs.11,664/-. While so, on 28.9.1998 the claimant/appellant along with his wife Amaraveni, his father Venkateswara Rao and some other relatives was travelling in jeep bearing No.MH 15 K 6520, driven by R1, who drove it in rash and negligent manner with hectic speed, and when the vehicle reached Khadakjam village of Bombay-Agra road, the driver came to the extreme left margin and dashed against a tree, as a result, the claimant sustained multiple grievous injuries and three persons died on the spot including the wife and father of the claimant. Other passengers were also sustained severe injuries in the accident. It is further alleged that immediately he was admitted in Civil Hospital from 28.9.1998 to 1.10.1998 and later shifted to NIMS, Hyderabad for better treatment from 2.10.1998 to 28.10.1998 whereat he undergone major operation to spinal cord D11 to L1 steffe plating.

6. Subsequently, he was admitted in Nagarjuna Hospital, Vijayawada on 20.11.1998 and discharged on 5.12.1998 where he undergone one more operation. The appellant/claimant was unable to work and even to answer his natural calls. The lower part of the body i.e., lower abdomen lost its sense and thereby he lost his earning capacity and unable to report to duty. The 1st respondent is driver, the 2nd respondent is the owner and the 3rd respondent is the insurer of the vehicle bearing No. MH 15 K 6520.

7. The respondent No.1/driver filed counter and contended that at the request of Dr.Rajendra Gandhi, the 2nd respondent gave his jeep gratuitously to go to pilgrimage from Manmad to Nasik and on the return journey on 28.9.1998, the driver – 1st respondent drove the jeep in normal speed, on account of rains; however, the jeep skidded towards left side of the road and dashed against the tree resulting death of four passengers and injuries to five persons. Hence, there is no negligence on the part of the driver.

8. The 2nd respondent – owner of the jeep filed counter and contended that on 28.9.1998 the jeep bearing No.MH 15 K 6520 belongs to him being driven by the 1st respondent while proceeding from Nasik to Manmad carrying family members of Dr.Rajendra Gandhi, who is his close family friend and when the said jeep reached Khadakjam village of Bombay-Agra road, due to rain, skidded off towards

left side of the road margin and dashed against the tree, in spite of best efforts taken by the 1st respondent.

9. The 3rd respondent – Insurance company filed written statement and additional written statement and contended that the documents filed by the claimant are fabricated, to secure an unlawful gain in collusion with driver and owner of the jeep bearing No.MH 15 K 6520. Since there is no notice of the accident from the claimant or the owner of the vehicle, it denies the rash and negligence of the driver of the insured vehicle and also alleged accident. The claimant and several others travelled in the vehicle without valid permit and in contravention of its sitting capacity and the number of persons determined to travel. The claimant is an unauthorized passenger who was travelling in the vehicle in violation of the Motor Vehicles Act, Rules and the permit. The risk is not covered by the policy as the vehicle was used as taxi at the time of the accident.

. The driver is not holding effective driving licence and valid badge for driving the vehicle. He is not authorized paid driver hence the third respondent is not liable to pay compensation. Since the terms and conditions to policy are violated and committed breach of contract of policy, the 3rd respondent is not liable. If at all there is insurance policy, the liability of the 3rd respondent is subject to otherwise to the terms, exceptions, conditions and limitation as to use of

policy and permit. It is further contended that the alleged treatment in civil hospital, Nasik and NIMS, Hyderabad where he underwent major operation to his spinal cord D11 to L1 and another major operation in Nagarjuna Hospital, Vijayawada and spent Rs.2,00,000/- for alleged grievous injuries and the lower part of the body lost its sense, are all to be proved by producing the documentary evidence and not admitted the permanent disability and loss of earnings.

10. In the additional written statement the contention of the 3rd respondent is that it issued private policy-B to the 2nd respondent vehicle No. MH 15 K 6520 but at the time of accident it was used as taxi. There were 11 passengers which is violation of the terms and conditions of the policy, therefore, the 3rd respondent is not liable to pay the compensation. The claim of the claimant/appellant under different heads is highly excessive, arbitrary and out of all probabilities.

It is further contended that the claimant is drawing pension of Rs.4,295/- as such the loss of earning capacity cannot be treated as 100%.

The claimant/appellant is entitled only 6% interest from the date of the award, but not from the date of the petition as per the direction issued by the Reserve Bank of India in the Banking Regulation Act.

11. After hearing both parties and on consideration of the entire material on record, the following issues were settled for trial :

- 1) Whether the petitioner sustained injuries in the motor vehicle accident on 28.9.1998 due to the rash and negligent driving of jeep MH 15 K 6520 by R1?
- 2) Whether the petitioner is entitled to the compensation as prayed for? If so, from whom?
- 3) To what relief?

On behalf of the appellant/claimant, before the Tribunal, P.Ws.1 to 3 were examined and Exs.A1 to A78 and X1 and X12 were got marked. On behalf of the respondents, R.W.1 was examined and Exs.B1 to B14 were got marked.

12. In view of the rival contentions, now, the point that arises for determination is :

“Whether the Award is suffering from any legal infirmities warranting interference?”

13. The contention of the appellant/claimant in MACMA No.685 of 2006 is that the Tribunal failed to consider the treatment undergone by him in different hospitals; treatment undergone under P.W.2, and also surgeries undergone, medical expenses incurred under Exs.A.3 to A.7 and A.28 to A.78 besides awarding the compensation under different heads like transport, damages to clothing, pain & suffering, loss of earning capacity etc and thereby the Tribunal failed to grant ‘just compensation’ basing on the evidence and material on record.

Whereas the contention of the appellant/ Insurance Company in MACMA No.1233 of 2006 is that the compensation awarded by the Tribunal is excessive; that it applied higher multiplier and that it fastened liability on it (Insurance Company) without considering the fact that the driver of the offending vehicle has no valid and effective driving licence.

14. The Tribunal passed the common judgment in M.V.O.P.No.493 of 1999 filed by Koka Dindikeswara Rao, M.V.O.P.No.619 of 2000 filed by the legal heirs of the deceased Koka Venkateswara Rao and M.V.O.P.No. 627 of 2000 filed by Koka Amaraveni, who is the wife of the appellant in MACMA.No.685 of 2006, i.e. Koka Dindikeswara Rao.

15. In fact all the above three MVOPs arise out of one and the same accident that took place on 29.08.1998 involving jeep bearing No.MH 15K 6520.

16. The deceased Koka Venkateswara Rao in M.V.O.P.No.619 of 2000 is the father of Dindikeswara Rao. The deceased Koka Amaraveni in M.V.O.P.No.627 of 2000 is the wife of said Dindikeswara Rao, who is the appellant in M.A.C.M.A.No.685 of 2006. The first respondent in M.A.C.M.A. No. 685 of 2006/second respondent in M.A.C.M.A. No.1233 of 2006 is the driver of the offending vehicle. The second respondent in M.A.C.M.A. No.685 of

2006/third respondent M.A.C.M.A.No.1233 of 2006 is the owner of the offending vehicle. The third respondent in M.A.C.M.A.No.685 of 2006/appellant in M.A.C.M.A. NO.1233 of 2006 is the Insurer of the offending vehicle.

17. In view of the above facts, the appellant in M.A.C.M.A.No.685 of 2006 is referred to as appellant/claimant, the third respondent therein-New India Assurance Company is referred to as respondent/Insurance Company, the first respondent therein is referred to as first respondent/driver, second respondent therein referred to as second respondent/owner hereinafter, for the sake of convenience.

18. Sri Koka Dindikeswara Rao, appellant in MACMA No. 685 of 2006 was examined as PW.1. His evidence is that as on the date of accident i.e. on 29.08.2008 he along with family members were travelling in the vehicle bearing No.MH 15K 6520 from Nasik to Manmad. After visiting Nasik, they were returning to Manmad on Bombay-Agra High Way. The first respondent-driver of the said vehicle was driving the jeep at high speed, in a rash and negligent manner and without control, in spite of repeated requests made by P.W.1 and his family members to drive slowly and cautiously, dashed against one VAD tree at 376 KM stone on the Bombay-Agra high way. During the cross examination, he stated that at the

time of accident, there were seven adults besides children, but he could not say number.

19. Ex.A.8 is the translated copy of FIR and Ex.B.13 is the translated copy of Charge sheet. A combined reading of Exs.A.8 and B.13 goes to suggest that the first respondent /driver of the said offending vehicle drove the same in rash and negligent manner, with high speed and on account of the same, he lost the control and then, the said jeep hit the tree situated by the side of the road. The Motor Vehicle Inspector who visited the offending vehicle issued Ex.A.11 MVI report wherein he specifically mentioned that the jeep was badly damaged and the accident occurred not due to mechanical defect of the jeep.

20. The 161 statements of the witnesses were marked through R.W.1 at Exs.B.10 to B.12. It is pertinent to see that the 161 statements of the witnesses can be used only to corroborate or contradict the witnesses who made such statements and that such 161 statement does not bear significance of the maker of it. It can be used only to corroborate or contradict the statements who made it and that the proper person who explain the contents of 161 statements is the Investigating Officer. Admittedly the Investigating Officer is not examined to prove Exs.B.10 to B.12 and therefore they are treated to be inadmissible in evidence.

21. The Senior Assistant of the New India Assurance Company Limited was examined as R.W.1. Admittedly he was not the direct witness to the accident. His evidence is that as on the date of accident, P.W.1 and his family members hired the jeep bearing No. MH 15K 6520 and that there were eleven passengers in the said jeep at the time of accident. His further evidence is that due to over load, the driver has lost control and dashed the tree situated by the side of the road. But it is not the specific evidence of R.W.1 that the overload of the jeep leads to loss of control by the driver and consequently the accident occurred. It is not the case of Insurance Company that the accident occurred due to overload of passengers, particularly when P.W.1 stated that there are only seven passengers and as per Ex.B.1 policy, the capacity of jeep is mentioned as 9 + 1. Ex.B.1 shows that net premium of Rs.5391/- was paid. The evidence of R.W.1 is not corroborated to establish that there are eleven passengers in the offending jeep. Even according to P.W.1 there are seven passengers whereas Ex.B.1 policy indicates the capacity of jeep was 9 + 1.

22. Under Ex.A.11, the Motor Vehicle Inspector noted the seating capacity of jeep as 10 including the driver. Therefore, the evidence of P.W.1 supported by Exs.A.11, B.1/A.9 policy establish that the capacity of the offending jeep is 10 including the driver. No rebuttal evidence is

produced by the Insurance Company. In those circumstances, the Tribunal rightly found that the offending vehicle was not overloaded at the time of accident and that it is not the case of Insurance Company that the accident occurred due to over load of the jeep bearing No. MH 15K 6520. Accordingly it reached the conclusion that the accident has nothing to do with the number of persons travelled in the crime vehicle at the time of accident while relying on the decisions in **NATIONAL INSURANCE COMPANY LIMITED Vs. SARUPO DEVI AND OTHERS** (2004 ACJ 961), **DIVISIONAL MANAGER, NATIONAL INSURANCE COMPANY LIMITED Vs. BUDHIYA AND OTHERS** (2003 ACJ 691) and some other decisions, wherein it was held that when there is no evidence that the accident occurred on account of overloading, the Insurance Company cannot escape from its liability to pay compensation.

Further, the contention of the Insurance Company is that there is no valid permit for the offending vehicle to run as taxi and hence it violated the terms and condition of the policy. The evidence of R.W.1 is that as per Ex.B.2 dated 9.5.2005 issued by the Regional Transport Officer, Nasik, the offending jeep bearing No.MH.15K 6520 is classified as Light Motor Vehicle and one time tax was paid for the said vehicle. Ex.A.10 shows that the first respondent/driver was having LMV driving licence to drive non transport LMV. The licence

was renewed from 14.02.1995 to 31.1.2015 for a period of twenty years which clearly shows that the first respondent was issued only LMV driving licence to drive LMV non transport. Under Ex.B.2 the vehicle was classified as LMV. Absolutely there is no evidence to show that at the time of accident, the vehicle was used as taxi. In the evidence, P.W.1, stated that he engaged jeep bearing No. MH 15K 6520 on 28.9.98 from Nasik to Manmad and after visiting Nasik, while they were returning to Manmad, on Bombay-Agra High way, the accident occurred on 28.09.1998. Ex.A.9 copy of policy shows that premium of Rs.5660/- was collected and Rs.450/- was collected as additional premium of P.A. beneficiaries as per IMT 5 for the nine passengers and Rs.15/- was paid for coverage of driver as per old IMT 19 including unnamed hirer and unnamed passenger. Accordingly the appellant/claimant is entitled for compensation on account of the accident involving the jeep bearing No. MH 15K 6520.

Further the contention of the appellant-Insurance Company is that the driver of the offending vehicle did not possess valid and effective driving licence at the time of accident. To substantiate that the driver was not having valid driving licence, it filed Ex.A.10/B.3, according to which, the first respondent/driver possessed LMV non transport driving licence. According to Ex.A.10, LMV non transport driving licence was issued for a period of twenty years commencing

from 14.02.1995 to 31.1.2015 which shows that the first respondent/driver was having LMV non transport driving licence. Under Ex.B.2, the offending jeep was classified as LMV. In **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 and yet MV Act, 1988 also distinguishes vehicles on basis of their usage (transport and non-transport) and transport vehicles are further classified on the basis of their carrying capacity and weight. Transport vehicles are further classified as public service vehicles, goods carriage, educational institution bus and private service vehicle. Prior to 1994 Amendment, transport vehicles were included under the category of 'light motor vehicle', 'heavy motor vehicle' etc as per gross vehicle weight or unladen weight. Section 3 of the MV Act, 1988, from the very beginning, provides about the transport vehicle. However, classes of vehicle classified in Section 10(2) were light motor vehicle, medium goods and passenger motor vehicle, and heavy goods and passenger vehicle. The change brought about in 1994 was substitution of transport vehicle in place of medium and heavy goods and passenger vehicles and in view of the decisions of this Court in **ASHOK GANGADHAR MARATHA Vs. ORIENTAL INSURANCE COMPANY LIMITED** {(1996) 6 SCC 620}, **NATIONAL INSURANCE COMPANY LIMITED Vs. ANNAPPA IRAPPA NESARIA** {(2008) 3 SCC 464}

and **KULWANT SINGH Vs. ORIENTAL INSURANCE COMPANY LIMITED** {(2015) 2 SCC 186} a person holding LMV licence was competent to drive a transport vehicle. The provisions of "light motor vehicle" in Section 10(2)(d) remains intact. In **ASHOK GANGADHAR MARATHA** (supra), **S.IYYAPAN vs. UNITED INDIA INSURANCE CO.** {(2013) 7 SCC 62}, **KULWANT SINGH AND ORS. vs. ORIENTAL INSURANCE CO. LTD.** (supra), and **NAGASHETTY vs. UNITED INDIA INSURANCE CO. LTD AND ORS.** {(2001) 8 SCC 56} the view taken is that when driver is holding licence to drive light motor vehicle, he is competent to drive transport vehicle of that category; whereas in **NEW INDIA ASSURANCE CO. LTD. v. 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 has to obtain endorsement to drive transport vehicle of that category; whereas in **NATIONAL INSURANCE CO. LTD. Vs. ANNAPPA IRAPPA NESARIA** (supra), it was laid down that before 28.3.2001 there was no necessity for the holder of licence to drive light motor vehicle to have endorsement to drive transport vehicle; whereas in **NEW INDIA ASSURANCE CO. LTD. vs. ROSHANBEN RAHEMANSHA FAKIR AND ANR** {(2008) 8 SCC 253} and **ORIENTAL INSURANCE CO. LTD. vs. ANGAD KOL AND ORS** {(2009) 11 SCC 356} the view taken is that it is necessary for 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). Since there is conflict in decisions of the Apex Court, with respect to pre-amended position and also after amendment has been effected in the forms in 2001, the matter was ordered to be placed before Honourable Chief Justice of India to constitute a larger Bench for resolving the issue. So the law as of today requires that, the holder of LMV licence has to obtain specific endorsement on licence to drive transport vehicle of LMV as provided under Section 2(41) of the Act. In the case on hand, there is no such endorsement on the driving licence of the respondent/driver in Ex.A.10/B.3. The offending vehicle was classified as LMV and it is a passenger carrying vehicle of which capacity is 9. Thus it is clear that the first respondent/driver did not possess such valid driving licence and therefore the policy conditions under Ex.A.9/B.1 are violated by the owner of the vehicle. To that extent, the Award of the Tribunal requires to be modified.

23. The contention of the appellant/claimant was that first he took the treatment in Primary Health Center, Pimpalgaon, later shifted to Civil Hospital, Nasik, therefrom shifted to NIMS Hospital, Hyderabad, later he was admitted in Nagarjuna Hospital, Vijayawada and took treatment spending huge amounts. But, the Tribunal failed to consider Ex.A7 - Hospital Bill and also rejected Exs.A4 and A5 bills, besides

ignoring the expenditure incurred towards transportation, damage to clothing and some other claims.

24. The evidence of P.W.1 is consistent through out that when the jeep bearing No.MH 15 K 6520 dashed against VAD tree at 376 KM stone on the Bombay-Agra highway, his family members and himself sustained grievous injuries and he lost his wife Amaraveni and father Venkateswara Rao in the said accident. Immediately after the accident one among the persons gathered at the accident spot, shifted the injured to the Government Hospital for medical treatment. The Medical Officer, Pimpalgaon (B) PHC examined and for better treatment, he was shifted to Government Hospital, Nasik, where he was inpatient from 29.8.1998 to 1.10.1998. While discharging from Civil Hospital, Nasik, it was advised to P.W.1 to shift, for better treatment, to NIMS Hospital, Hyderabad and in NIMS Hospital, he underwent surgery for spinal cord at D11 to L1. As there is no proper result, subsequently he admitted in Nagarjuna Hospital, Vijayawada for further medical treatment and Dr.P.Ramakrishna - P.W.2 and his team of Doctors treated him as an inpatient from 20.11.1998 to 5.12.1998, where he undergone surgeries to the spinal cord for extra-dural compression to D11 - D12 with flaccid paraplegia. Despite operation, he is suffering from permanent physical disability due to injuries sustained in the motor accident.

25. P.W.2, the Doctor, who treated him in Nagarjuna Hospital is examined as P.W.2 and he in all aspects corroborated P.W.1 that P.W.1 Dindikeswara Rao admitted in Nagarjuna Corporate Hospital on 20.11.1998. The evidence of P.W.1 is corroborated with the medical evidence of the Doctor - P.W.2 and supported with Ex.A15 – the discharge summary issued by Nagarjuna Hospitals dated 5.12.1998 wherein it was specifically mentioned that P.W.1 admitted in the hospital on 20.11.1998 and discharged on 5.12.1998. During the examination, the team of Doctors diagnosed post traumatic D12 wedge compression fracture with subjugation with extra dural compression D11 and D12 with flaccid paraplegia. Posterior fixation done at NIMS in October, 1998. He undergone surgery for trans-abdominal retro peritoneal approach, excision of displaced bone fragment and decompression was done under GA.

26. It is also the consistent evidence of P.W.2 and P.W.1 that prior to admission in the Nagarjuna Hospital, he took treatment in the NIMS Hospital from 2.10.1998 to 28.10.1998. The Doctors in the NIMS as per Ex.A14 diagnosed D12 WC fracture FR grade-A. In Ex.A14 against clinical summary it was clearly mentioned, alleged to have been injured in a RTA near Punpalgar on 28.9.1998, observed ENT bleeding, H/o paraplegia with loss of sensations below the level of umbilicus since the injury. The patient was catheterized at local hospital. X.ray shows DL spine D12 WC

fracture with retropulsion. MRI DL spine D12 with fracture retropulsed D12 causing cord compression. Ex.A14 further goes to suggest that surgery done to D11 to L1 steffe plating. The patient developed oral moniliasis which was managed with oral flucanazol, rest of his hospital stay was uneventful. Mild wound infection was treated with higher antibiotics. Physiotherapy was taught. The Doctors at the time of discharge observed Afebrile wound healed on foleys catheter, no change in N/L status.

27. The evidence of P.W.1 corroborated with P.W.2 supported by Ex.A14 and A15 goes to suggest that P.W.1 sustained post traumatic D12 wedge compression fracture with subjugation with extra dural compression D11 and D12 with flaccid paraplegia. Posterior fixation done at NIMS in October, 1998. He undergone surgery for trans-abdominal retro peritoneal approach, excision of displaced bone fragment and de-compression was done under GA. It is also evident from the evidence of P.W.2 that P.W.1 undergone surgery for posterior spine injury with wedge compression fracture D12 with paraplegia. In continuation of the treatment at NIMS posterior with fixation of the spine injury was done. Again P.W.1 came to the Nagarjuna Hospital on 20.11.1998 with persistent paraplegia for which he was admitted on 20.11.1998. After investigation it was noticed fracture with subjugation with extra dural compression D11 and D12 with flaccid paraplegia. He was operated displaced

bone fragment which was compressing the official spinal cord was exercised and he was discharged on 5.12.1998.

28. With regard to disability, there is the evidence of P.W.1 which shows that he also took treatment in the Railway Hospital, Vijayawada and Hyderabad who declared him as not fit for any job in all classes of railway services. Ex.A2 is the health book in O.PNo.3057/KZJ headquarters, Lalaguda, Hyderabad which reveal that on 29.12.1998 it is specifically noticed complaining of paraplegia, P12 wedge compression fracture and unfit for any duty. Ex.A17 is the certificate issued by the Hospital SC railway, Kazipet, dated 7.6.2000 wherein it was specifically mentioned that the claimant P.W.1 was in sick list from 25.10.1999 whereas the accident was occurred on 29.8.1998. He was called for special medical examination and found unfit in all classes of railway services with effect from 5.6.2000 to which unfit certificate was enclosed under Ex.A19. Besides the evidence of P.W.1, there is the evidence of Doctor - P.W.2 about the disability of P.W.1, wherein P.W.2 specifically deposed that P.W.1 is having paraplegia, therefore, he cannot move both legs and cannot pass urine or stools. P.W.1 has to use water bed or air bag whenever he wants to take rest, if he does not use them, he is likely to get bedsores. Further, P.W.1 has to use a urine catheter for passing urine for his life time. Because of this he may likely to get infection for which he has to use medicine during the entire life time. It is further certified that P.W.1

needs the help of at least one or two attenders to perform even routine activities during his life time. During cross-examination, P.W.2 stated that Nagarjuna Hospital authorities did not refer P.W.1 to NIMS at Hyderabad or that hospital referred P.W.1 to Nagarjuna Hospital after the operation. He also admits that he does not know about the treatment in NIMS hospital at Hyderabad. The nature of the treatment in NIMS Hospital stated by P.W.2 in his chief is based on the discharge summary under Ex.A14 issued by NIMS Hospital. Though there is no specific mention about the surgery in Ex.A14, but it shows that on 14.10.1998 he undergone surgery - D11 to L1 steffe plating and the same was mentioned in Ex.A14.

29. The evidence of P.W.2 is to the effect that the Nagarjuna Hospital is a corporate hospital and P.W.2 will be paid for the services rendered by him. That is why he stated that he does not know if the hospital authorities collected Rs.12,000/- on his behalf from P.W.1 and he cannot rule out the possibility of the hospital authorities collecting more money and paying less money to him.

30. The consistent evidence of P.W.1 is that in Nagarjuna Hospital he was admitted on 20.11.1998 and discharged on 5.12.1998 and underwent surgeries. As per P.W.2 surgeries were done to his spinal cord for extra dural compression to D11-D12 with flaccid paraplegia. It is also

the consistent evidence of P.Ws.1 and 2 that P.W.1 suffered permanent physical displacement due to injuries and the Railway hospital authorities declared him as unfit for all classes of job work and he voluntarily retired with effect from 8.12.2000 and the Railway Board also declared him as unfit for all classes of services as per Ex.A17 proceedings dated 7.6.2000 which is corroborated by the evidence of P.W.3. Besides that, P.W.2 – Doctor's evidence corroborated with the evidence of P.W.1 and established that P.W.1 has to use water bed or air bag whenever he likes to take rest and if he does not use them, there is every possibility of his getting bed soreness. Further, P.W.1 has to use urine catheter for passing urine during his life time, because of that he may likely to get infection, for which he has to use medicines during the entire life and he requires 1 or 2 attendants even to perform routine activities. The same facts are also revealed from Exs.X1 to X11 x.rays, which are produced from the custody of P.W.2 hospital authorities.

31. The evidence of P.Ws.1 and 2 corroborated and supported by Exs.A14 to A20 established that P.W.1 was declared permanently unfit to work in all classes of Railway services with effect from 5.6.2000 and to that effect Ex.A17 – unfit certificate was also issued. Further, P.W.1 can not attend his usual works without assistance of 1 or 2 attendants. P.W.1 has undergone surgeries in the NIMS as well as Nagarjuna Hospital as per Exs.A14 and A15 discharge

summaries for the D11 to D12 and those disabilities can be seen from Exs.X1 to X11 x.rays. P.W.1 has to use water bed or air bed whenever he wants to take rest. If he does not use them, there is likelihood of getting bed soreness. Further, he has to use urine catheter for passing urine during the entire life time, because of that he will get infection for which he has to use medicines through out the life and accordingly P.W.1 became unfit for any work and the disability, according to the judgment of the Tribunal, is 100%.

32. It is the case of the respondent-insurance company that the bills, particularly Exs.A5 and A6 are fabricated, for which the evidence of P.W.1 is that for the surgical charges he has paid Rs.50,302/- to Sri Durga Agencies, Vijayawada, under four bills as marked in Ex.A5 and he has also paid Rs.33,098/- to Sri Rama Chandra Surgicals, Vijayawada, under 9 bills as marked in Ex.A6.

33. *Per contra*, there is the evidence of R.W.1 wherein it is clearly stated that claimant is not entitled for the amounts under the bills of Sri Durga Agencies under Ex.A5 and Sri Rama Chandra Surgicals under Ex.A6 as they were created for the purpose of the claim.

34. Since the insurance company doubted Exs.A5 and A6 bills, it issued registered notice under the original of Ex.B4, dated 30.7.2004 to Sai Durga Agencies and the same was returned as per Ex.B5 with endorsement 'addressee left

without instructions, hence returned to the sender'. Similarly, the insurance company issued original of Ex.B6 notice dated 30.7.2004 to Sri Rama Chandra Surgicals and the same was returned under Ex.B8 postal envelop with endorsement "addressee left without instructions, hence returned to the sender".

35. In Ex.B4 the insurance company informed Sri Durga Agencies by enclosing the photo copies of bills dated 25.4.1999, 6.4.2000 and 23.8.2001 and 10.10.2002 for the surgical items purchased by P.W.1 and requested the Durga Agencies to let the insurance company know whether their bills are cash bills or invoices and requested a reply. In Ex.B6 also Sri Rama Chandra Surgicals was requested to check up and inform whether bills enclosed are cash bills or not by enclosing the Photostat copies of 2 bills dated 16.4.2001 and 21.2.2002. Ex.B7 is another notice issued to Sri Rama Chandra Surgicals dated 5.5.2005 with reference to Ex.A6 requesting to confirm bills under Ex.A6, giving bill numbers and dates and amounts, whether those bills are issued to P.W.1 for supply of surgical items, whether those are cash bills or credit bills. With regard to Exs.B4 to B8 and Exs.A5 and A6, P.W.1 was cross-examined at length and there is a suggestion that Exs.A5 and A6 are created for the purpose of the claim and he gave evasive answer stating that he does not know whether the Doctor Jashuva opened a clinic in the address stated in Ex.A6 and finally his reply was that

he is not going to examine the proprietors of Durga Agencies and Ramachandra Surgicals. Further, the suggestion is that since Exs.A5 and A6 are created, P.W.1 is not prepared to examine the proprietors of Durga Agencies and Ramachandra Surgicals.

36. The Tribunal, having considered the oral evidence of R.W.1, bills/vouchers under Exs.A5 and A6, the notices and returned covers of Durga Agencies and Sri Ramachandra surgicals under Exs.B4 to B8, came to the conclusion that except the solitary testimony of P.W.1, none of the persons connected to Exs.A5 and A6 were examined. P.W.2 – Doctor, who treated P.W.1, also did not depose that the medical items purchased under Exs.A5 and A6 were under his advice. Even P.W.2 did not refer to those purchases made under Exs.A5 and A6. The Tribunal, having considered the notices and returned covers under Exs.B5, B6 and B7, came to the conclusion that it is not inclined to award any amount under Exs.A5 and A6. However, it is in the evidence of P.W.2 – Doctor that P.W.1 has to use water bed or air bag whenever he wants to take rest and if he does not use them, he is likely to get bed sore. Further, P.W.1 has to use a urine catheter for passing urine through out his life time. Because of this, he may likely to get infection, for which he has to use medicines during the entire life time. Hence, the Tribunal has awarded Rs.30,000/- in lump sum for purchase of water beds and catheters, which is very meager and need to be enhanced,

because as per the evidence of P.W.2 he requires life long use of water beds and catheters.

37. There is the evidence of P.W.1 that he engaged Nirmala Kumari as a cook and P.Hemantha Kumar as attendant and he paid Rs.98,000/- to the cook and Rs.2,29,000/- to Hemantha Kumar, attendant. P.W.2 – Doctor also supports P.W.1 that life long he requires 1 or 2 attendants and his wife also died in the same accident; therefore, he requires a cook and attendant to attend on him through out his life. Ex.A3 is one of such bunch of vouchers under which he paid Rs.1,500/- per month to the cook Nirmala Kumari and some of vouchers shows that P.W.1 has paid Rs.1,700/- per month and the amounts when summed up, they are arrived at Rs.99,500/-, but according to P.W.1 he spent Rs.98,000/- only.

38. The evidence of P.W.1 is that under Ex.A4 he has paid Rs.4,50,000/- to attendant P.Hemantha Kumar, even then he claimed a sum of Rs.2,29,000/- only. It is the evidence of P.W.2 – Doctor that P.W.1 cannot move both his legs and pass urine or stools and he has to use water bed or air bed for taking rest and he has to use urine catheter through out his life and needs help of 1 or 2 attendants to attend on him for his routine duties through out his life. In spite of the evidence of P.W.1, corroborated with P.W.2 – Doctor and Exs.A3 and A4, the Tribunal, though there is no

rebuttal evidence, disbelieved Exs.A3 and A4 and came to the erroneous conclusion that P.W.1 would have necessarily spent a sum of Rs.2,000/- per month, therefore, awarded Rs.1,75,000/- to P.W.1 in lump sum under the head attendant charges which is erroneous and not based on documentary or rebuttal evidence which requires modification and accordingly under Exs.A3, P.W.1 is entitled to Rs.98,000/- towards the salary to cook Nirmala Kumari and though he actually incurred Rs.4,50,000/- under Ex.A4, since he limited his claim to Rs.2,29,000/-, he is entitled to Rs.2,29,000/- towards attendant charges of P.Hemantha Kumar, which really P.W.1 has paid.

39. The consistent evidence of P.W.1 is that he incurred an amount of Rs.1,38,929/- towards medical expenses, out of which under Ex.A54 he has incurred Rs.31,000/-. P.W.2 – Doctor's evidence is that P.W.1 was treated as inpatient in Civil Hospital, Nasik from 28.9.1998 to 1.10.1998. According to P.W.2 in the NIMS hospital he was treated as inpatient from 2.10.1998 to 28.10.1998 where he undergone major operation for spinal cord D11 to L1 and as there is no result, he was admitted in Nagarjuna Hospital on 20.11.1998 and discharged on 5.12.1998 where he undergone surgery to spinal cord for extra dural compression to D11-D12 of flaccid paraplegia. Exs.A28 to 78 are confronted to P.W.2 as they are related to the bills for the medicines and treatment purchased in Nagarjuna Hospital

and Exs.X1 to X11 are the x.rays. P.W.2 also confronted Ex.A54 bill for Rs.31,000/- dated 26.11.1998. Though it does not contain the description of the issuing authority, it contains the name of the Doctor - P.W.2 and also room No.316 and payment of Rs.31,300/- on 26.11.1998. It is admissible in evidence and for which the claimant is entitled. Ex.A67 is a bill of Rs.13,000/- and Ex.A76 is for Rs.18,300/- and they are also accepted by the Tribunal, but erroneously rejected the bill Ex.A54, since it is issued by Nagarjuna Hospital and confronted to P.W.2, for which the claimant also entitled to Rs.31,300/- covered by Ex.A54.

40. Further, the evidence of P.W.1 is that he is entitled for Rs.10,00,000/- towards permanent disability and loss of earnings. Ex.A17 is the letter addressed by Doctor Anjanappa, Senior Medical Officer, S.C.Railways to the Station Superintendent, Kazipet, wherein it was certified that P.W.1 found unfit for all classes of railway services with effect from 5.6.2000 and that the unfit certificate was issued and also it issued Ex.A2 - health book for the treatment of P.W.1. Ex.A19 also shows the sickness and physical disability of P.W.1 which shows that P.W.1 was HTTE of Station, Kazipet, wherein railway hospital itself certified that it is a case of post-traumatic D12 wedge compression fracture with subjugation with dural compression of D11 and D12 with fracture of paraplegia and he was admitted in NIMS Hospital

on 2.10.1998 and discharged on 28.10.1998 and surgery was also done there and it was supported by Ex.A14.

41. It is also urged on behalf of the Insurance Company that there is no valid permit for the vehicle to run as a taxi and hence, it violated the terms and conditions of the policy. Ex.A9 is the attested copy of the policy filed by the claimant. The Insurance Company also marked the copy of the policy as Ex.B1. Ex.B2 is the information furnished by the Regional Transport Officer, Nasik about the status of the crime vehicle. The Senior Assistant of the Insurance Company examined as R.W.1 stated in his evidence that the crime vehicle was used for hire as a taxi on the date of accident and that it is in violation of the terms and conditions of the policy. It is true that Ex.B2 shows the crime vehicle as a light motor vehicle. It is nowhere stated that it cannot be used as a taxi on hire. On the other hand, Exs.A9 and B1 consists only one sheet of the insurance policy. Both of them do not contain the remaining sheets of the policy. They show the capacity of the vehicle including the driver as '9' in number. A sum of Rs.4,500/- was collected as premium under this head. It also shows that a sum of Rs.7,028/- was collected as premium for its own damage. It is the case of the claimant that the policy contains some other sheets and that the insurance company did not produce the document in full. Considering the circumstances, this contention is not without substance. However, it is for the insurance company to

establish that it did not receive any premium on that account. In view of what has been stated above, I am of the opinion that this contention of the insurance company does not also hold any water. Hence, I am not inclined to accept this contention of the Insurance company as it does not hold any water. Hence, I am not inclined to accept this contention of the Insurance Company.

42. In view of my aforesaid finding, the decisions relied upon by the Insurance Company that a decree can be passed against it with liberty to recover the same from the owner (insured) of the vehicle have no relevance and are not applicable to the facts of the case.

43. Exs.A16 and A20 and Ex.X12 the Photostat copy of Ex.A18 – service certificate shows that the date of birth of P.W.1 is dated 26.6.1952 and he took voluntary retirement on 8.12.2000 and Ex.A16 - circular issued by Railways, Ex.A20 – certificate regarding retirement shows that age of superannuation of P.W.1 is 60 years. P.W.3 produced Ex.X12 xerox copy of the service register and deposed that P.W.1 took voluntary retirement on 8.12.2000 and at the time of retirement, he was paid all the retirement benefits and as per service register - Ex.X12, the date of birth of P.W.1 is 26.6.1952 and he was drawing a monthly pension of Rs.4,100/- approximately. The net salary of P.W.1 for the month of September, 1998 was Rs.9,005/-. To corroborate

the same, Ex.A12 – pay slip for the month of September, 1998 was filed, wherein also date of birth of P.W.1 was noted as 26.6.1952.

44. Having considered the evidence of P.W.1, the date of birth of the claimant can be considered as 26.6.1952 and thus, P.W.1 was 46 years old by the date of the accident and P.W.3 clearly deposed that salary of P.W.1 is Rs.9,005/-. The disability has already considered at 100%, because the Railways itself declared P.W.1 as unfit and the Doctor declared that the claimant cannot attend his calls of nature without the assistance of 1 or 2 attendants, therefore, the disability is 100%, which is correctly assessed by the Tribunal.

45. Further, the contention of the Insurance Company is that pension has to be deducted from the income as he is receiving the same. P.W.1 in the evidence admitted that he took voluntary retirement on receiving the pension. According to P.W.3, after retirement P.W.1 is receiving pension of Rs.4,100/- approximately.

46. The Tribunal relied on the case of **Vimal Devi and Ors. Vs. Hari Singh and Ors.** (2004 ACJ 1586) wherein it was held that because of voluntary retirement, the petitioner is getting less pension, therefore the contention of the Insurance Company that pension should be excluded cannot be tenable. In the case of **Oriental Insurance Co.**

Ltd. Vs. Dipali Sarma and Ors. (2017(4) GLT 173) the High Court of Gujarat held that in view of the ratio laid down by the Apex Court in the case of **Helen C. Rebello (Mrs.) and Ors. Vs. Maharashtra State Road Transport Corporation & Anr.** ((1991) 1 SCC 90) later on affirmed in **United India Insurance Company Limited Vs. Patricia Jean Mahajan** ((2002) 6 SCC 281), as well as the decision of the High Court in **Arati Chakraborty & Ors. Vs. Nephurai Jamatia & Anr.** ((2006) 2 GLT 20), the law in respect of family pension is no longer *res integra*.

47. In the case of **Reliance General Insurance Company Limited Vs. Shashi Sharma and Ors.** (AIR 2016 SC 4465) the Apex Court held that the benefits extended to the dependents of the deceased Government employee in terms of Sub-Rule (2) to Sub-rule (5) of Rule 5 including family pension, life insurance, provident fund etc., that must remain unaffected and cannot be allowed to be deducted, which any way would be paid to the dependents of the deceased Government employee, applying the principle expounded in **Helen C. Rebellow's case** (supra), wherein the Apex Court held that provident fund, pension, insurance and similarly any cash, bank balance, shares, fixed deposits etc., are all a "pecuniary advantage" receivable by heirs on account of one's death, but all these have no connection with amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the

periphery of the Motor Vehicles Act to be termed as “pecuniary advantage” liable for deduction.

48. The settled law from the above decisions is clear that the pensionary benefits are pecuniary advantage receivable by the heirs on account of one’s death and they cannot be deducted on one’s death, but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death under the Motor Vehicles Act. So, the Tribunal rightly held that the pension of Rs.4,100/- received by the claimant on account of voluntary retirement is not deductible.

49. Having considered the date of birth of the claimant as 26.6.1952 and the accident was on 28.9.1998, as on the date of accident, the deceased was 46 years old. The salary of the claimant is taken as 9,005/- per month. The Tribunal assessed the permanent disability at 100%, because Railways itself declared him as unfit for any class of work.

50. The salary of P.W.1 is Rs.9,005/-, which comes to Rs.1,08,060/- per annum, which is rounded to Rs.1,08,000/- and after deducting 1/3rd towards his personal expenses, it comes to Rs.72,000/-. Since P.W.1 is aged 46 years, the relevant multiplier applicable to his age is ‘13’ as per **Sarla Verma v. DTC** ((2009) 6 SCC 121), but the Tribunal having

found that multiplier '13' is applicable erroneously applied the multiplier '12'. After applying multiplier '13', the loss of income to P.W.1 comes to **Rs.9,36,000/-**.

51. Besides that, the claimant is also entitled to **Rs.1,00,000/-** towards pain and sufferance, mental shock and agony as awarded by the Tribunal and the claimant is also entitled to **Rs.98,000/-** under Ex.A3 – bunch of vouchers and **Rs.2,29,000/-** under Ex.A4 – bunch of vouchers and **Rs.31,500/-** under Ex.A54- medical bill. The claimant is entitled to Rs.1,38,929/- rounded to **Rs.1,40,000/-** towards Ex.A7 hospital bills. The claimant is also entitled to Exs.A28 to 53 and Exs.A55 to 78 – medical bills for a sum of Rs.43,927/-, rounded to **Rs.45,000/-**. The claimant claimed Rs.20,000/- towards damage to clothing, on this head, the claimant is entitled to **Rs.5,000/-**. The claimant claimed Rs.10,000/- towards transportation, which is reasonable, therefore, we award **Rs.10,000/-** towards transportation. Out of the claim of Rs.50,000/- towards extra nourishment, we award **Rs.30,000/-** towards extra nourishment. Considering the evidence of P.W.2 that the claimant has to depend upon water beds and urine catheters through out his life, we award **Rs.1,00,000/-** towards surgical items including Exs.A5 and A6.

52. Thus, in all the claimant is entitled to Rs.17,24,500/- towards compensation.

53. Therefore, the Award is modified and the claimant/appellant is entitled to Rs.17,24,500/-.

54. Accordingly, the appeal filed by the claimant in M.A.C.M.A. No.685 of 2006 is partly allowed, while setting aside and modifying the order and decree dated 18.1.2006 in O.P.No.493 of 1999 on the file of the Motor Vehicle Accident Claims Tribunal-cum-V Additional District Judge, Vijayawada and passed the modified award for Rs.17,24,500/- against the respondents 1 to 3 in O.P. with proportionate costs and with interest @ 7.5% per annum from the date of petition i.e., 7.7.1999 till the date of deposit or realization, which shall be deposited, after adjusting the amount, if any, already deposited or paid, within a period of 30 days from the date of receipt of a copy of the appeal judgment.

On such deposit, the claimant is permitted to withdraw the same.

55. Consequently, the appeal M.A.C.M.A. No.1233 of 2006 filed by the Insurance Company is dismissed with costs.

56. Advocate fee is fixed at Rs.2,500/- each in both the appeals.

57. Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTICE C.PRAVEEN KUMAR

JUSTICE N.BALAYOGI

May, 2018
Msnr/Skmr

