HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No.1869 of 2010

JUDGMENT:

The Appellant / Respondent No.2-Bajaj Allianz General Insurance Limited, represented by its Divisional Manager, Visakhapatnam District, aggrieved by the Award and Decree dated:12.3.2010 in O.P. No.294 of 2008 on the file of the II Additional District Judge-cum-Motor Accidents Claims Tribunal (FTC), Parvathipuram, awarding compensation of Rs.2,79,500/- with interest at 6% per annum from the date of petition till the date of realization against respondent No.1 and that the appellant/respondent No.2 shall pay award amount first and recover the same from the respondent No.1-owner-cum-driver of the offending vehicle thereafter, who shall deposit the same within one month from the date of order.

Further ordered that on such deposit, the petitioners 2 and 3 are awarded an amount of Rs.1,00,000/- each and the same shall be deposited in any Nationalised Bank till they attain majority and the Bank shall renew the same from time to time. Apportioned amount of Rs.79,500/- is awarded to 1st petitioner, who is permitted to withdraw the entire amount of Rs.79,500/- with accrued interest and proportionate costs. Advocate fee fixed at Rs.3,500/-, preferred this Appeal, besides other grounds. Even though the driver-cum-owner of the offending auto has no valid and effective driving license, the Tribunal erroneously held that the said breach of condition is not so fundamental to have contributed for the cause of accident and erroneously fastened liability on the appellant.

2. It is contended that the Tribunal having came to conclusion that the Insurance Company violated the terms and conditions of the policy, instead of exonerating the appellant-insurance company, erroneously passed the order jointly and severally and ordered to pay and recover the same which is contrary to the settled principles of law.

3. It is further contended that, the relevant Multiplier applicable is 16 for the age group of 35 years but not 17. Accordingly, the Tribunal erred in applying the Multiplier-17. The respondents 1 to 3/claimants though appeared through their Counsel, failed to advance their arguments. Though the respondents 2 and 3 being minors represented by respondent No.1 and respondent No.4 having received notice, none appeared and represented the matter.

4. The claim, in brief, is as follows:

On 30-11-2007 at about 6.00am., the deceased Korada Suramma along with some others boarded an auto bearing No.AP-35-U-6576 at Lenkapeta village to go to Temple for darshanam of Goddess Santhoshimatha at Cheepurupalli. After darshanam, in return, when the auto reached fire station, the driver of auto drove the auto in rash and negligent manner with high speed even without following any precautions, lost control, applied sudden breaks, as a result of which, K. Suramma fell down from the auto and received head injury.

Immediately, she was shifted to Community Health Centre, Cheepurupalli in 108 ambulance for first-aid and the doctor after giving first-aid referred her to the District Head Quarters Hospital, Vizianagaram for better treatment. While under going treatment in the said hospital, she died on 03-12-2007 due to head injury. Had the driver of auto took immediate care in driving vehicle would have avoided accident.

The deceased was 35 years old on the date of accident and used to do agricultural-cum-shepherdess and thereby, she used to earn an amount of Rs.4,000/- per month and maintaining petitioners who are her husband and minor children.

5. The respondent No.1 is the owner-cum-driver of the auto and the respondent No.2 is the insurer of the said auto bearing No.AP-35-U-6576. Respondent No.1 was set exparte and did not file any counter. Respondent No.2 filed counter denying averments made in the petition. It does not admit the age, income, avocation and health condition of the deceased at the time of accident and also not admitted that the deceased was 35 years and she was doing agricultural work. The respondent No.1-driver cum owner of the crime vehicle was not having a valid and effective driving license at the time of accident. That the respondent No.l drove the vehicle knowing fully well that he is not in possession of the required driving license and therefore, has

contravened the provisions of the Motor Vehicles Act and the Rules framed there under and has committed breach of terms and conditions of the policy.

It is further contended by respondent No.2 in his counter that the accident was due to fault of the deceased K. Suramma, but not fault of the driver of the offending vehicle.

6. Having considered the pleadings and after hearing both the parties, the Tribunal settled the following issues for trial:

(1). Whether the pleaded accident occurred due to rash and negligent driving of respondent No.1?

(2). Whether the petitioners are entitled for compensation, if so, at what quantum of amount the petitioners are entitled?

(3). To what relief?

7. On behalf of claimants, PWs.1 and 2 were examined and got marked Exs.A1 to A4 and on behalf of respondent Nos.2/appellant, RWs.1 and 2 were examined and Exs.B1 to B5 and Exs.X.1 and X2 were marked.

8. Now, the point that arises for determination is:

Whether the award suffer from any legal infirmities warranting interference in this Appeal?

9. The contention of the appellant is that since the driver-cum-owner of the offending auto did not possess valid and effective

driving license, the Tribunal erred in fixing liability on the appellant/respondent No.2, ordering to pay and recover. Further, there is no negligence on the part of the driver of the offending auto.

10. *Per contra*, the contention of the respondents 1 to 3 / claimants is that the accident was due to rash and negligent manner of the respondent No.1 who is the owner-cum-driver of the offending auto bearing No.AP-35-U-6576 and since the auto is insured with appellant/respondent No.2, the Insurance Company is liable to pay the compensation.

11. The petitioner No.1-K. Appanna who is none other than husband of the deceased-Suramma was examined as PW.1. His clinching evidence is that the petitioners 2 and 3 are the minor children of PW.1 and deceased Suramma is his wife. There is no cross-examination of PW.1 with regard to relationship between the claimants and the deceased-Suramma. With regard to dependency, there is a suggestion that PW.1 being husband, duty cast upon him to provide food and shelter to his wife and he is not depending on the earnings of the deceased wife. From such suggestion, it is very clear that the respondent No.2 is not disputing the relationship between the claimants and the deceased and they are the dependents.

The further evidence of PW.1 is that on 30.11.2007 at about 6.00 am, the deceased-Suramma along with some others were proceeding in auto bearing No.AP-35-U-6576 from Lenkapeta village to go to Cheepurupalli for darshanam of Goddess Santhoshimatha. Admittedly, PW.1 is not an eye witness to the accident. During the cross-examination, PW.1 admitted that he is not an eye witness to the accident and immediately after the accident, his wife was taken to Community Health Centre, Cheepurupalli where the Doctor given first-aid and referred her to the District Head Quarters Hospital, Vizianagaram for better treatment.

Ex.A1 is the certified copy of the FIR which was registered basing on written complaint of PW.1 on 3.12.2007 on which day Suramma died succumbed due to head injury. In Ex.A1, there is a clear recital that his wife along with some others boarded an auto at Lenkapeta village to go to Cheepurupalli and in return when reached the fire station, the accident occurred. The investigating officer after thorough investigation, filed Ex.A3-charge sheet against P.Samba, driver of the auto bearing No.AP-35-U-6576 wherein PW.2 is cited as 7th witness who along with deceased-Suramma boarded the auto bearing No.AP-35-U-6576 on 30-11-2007 at about 6.00am to go to darshanam of Goddess Santhoshimatha at Cheepurupalli and in return, the auto met with an accident, as a result, Suramma fell down, sustained head injury and while undergoing treatment, Suramma died and the Doctors who conducted post-mortem on the dead body, issued Ex.A2-post-mortem certificate finding that due to shock and haemorrhage and injury to brain, she died. Post-mortem examination was commenced at 2.50pm on 4.12.2007 and according to PWs1 and 2, she died on 3.12.2007, due to head injury.

The Motor Vehicle Inspector report under Ex.A4 opined that the accident was not due to any mechanical defect of the vehicle No.AP-35-U-6576. P. Samba is noted as owner of the vehicle against column No.16 (a) of Ex.A4.

12. Though PW.2 was cross-examined at length, could not elicit any favourable material to the respondent No.2, itself is conscious that PW.2 was cited as witness in A3-charge sheet and gave suggestion that though he was cited as 7th witness was travelling along with others in the auto on the date of accident and further suggestion is that there were seven passengers including PW.2 when the deceased was travelling to go to Cheepurupalli. RW.1 is the legal executive of Respondent No.2 Company, admittedly is not an eye witness to the accident. The other witness- RW.2 is the Record Assistant of R.T.O., Vizianagaram who is also not concerned with the accident. Therefore, the evidence of RWs.1 and 2 is of no use while determining rash and negligence driving of the driver.

13. The Tribunal having considered the consistent and corroborate evidence of PWs1 and 2 supported by Exs.A1 to A4 and in the absence of any rebuttal independent and material evidence came to conclusion that respondent No.1 who is the owner-cum-driver of the offending auto bearing No.AP-35-U-6576 in return journey after

darshanam of Goddess Santhoshimatha when reached fire station, drove the auto in rash and negligent manner without following any precautions with high speed lost control, applied sudden breaks, as a result of which, K. Suramma fell down from the auto and sustained head injury. Immediately, she was shifted to Community Health Centre, Cheepurupalli in 108 ambulance for first-aid and the doctor after giving first-aid referred her to the District Head Quarters Hospital, Vizianagaram for better treatment. While under going treatment in the said hospital, she died on 03-12-2007 due to head injury. The auto number is specifically asserted in Ex.A1 and inquest officer, after thorough investigation filed charge sheet- Ex.A3 against respondent No.1 and the MVI report-Ex.A4 opined that the accident was not due to any mechanical defect of the vehicle No.AP-35-U-6576 and it was due to rash and negligent driving of driver of the auto and the Doctors opined in Ex.A2-post mortem certificate that due to shock and haemorrhage and injury to brain, she died. Accordingly, there is nexus between the accident and death. The Tribunal further found that the evidence of RWs.1 and 2 who is a legal executive of the Respondent No.2 Company and Record Assistant of RTA, Vizianagaram, their evidence is not helpful in any way to disprove the evidence of PWs.1 and 2 and the documentary evidence under Exs.A1 and A3 and ultimately found that the accident was due to rash and negligent driving of the driver of the offending auto bearing No.AP-35-U-6576. This finding is legal, valid and do not suffer from any legal infirmities.

14. With regard to the contention of the appellant /respondent No.2 that the driver had no valid and effective diving license at the time of accident, RW.1-N.Srinivasa Rao (legal executive) of respondent No.2 Company and in pursuance of Ex.B1 authorization letter, N. Srinivasas Rao was examined as RW.1. His evidence is that, respondent No.2 issued Ex.B2-Insurance policy in respect of auto bearing No.AP-35-U-6576 in the name of respondent No.1 and the same is valid from 8.6.2007 to 7.6.2008. The respondent No.1 is the owner of the said auto bearing No.AP-35-U-6576 and the accident occurred on 30.11.2007 by which date Ex.B2 policy is in force and the said fact is not disputed by RW.1. Further, his evidence is that they have investigated into the matter and obtained DL particulars of the driver of auto from RTA, Vizianagaram and found that the driver of auto bearing No.AP-35-U-6576 was not having valid and effective driving license on the date of accident ie., 30.11.2007 and accordingly, they have issued legal notice-Ex.B3 to the respondent No.1 calling upon to produce the valid and effective driving license as on the date of accident, in the name of P. Samba along with notice under order 12, rule 18 of C.P.C. The said notice was served on respondent No.1 as per Ex.B4-acknowledgement, but there is no reply / response from the respondent No.1.

The evidence of RW.1 supported by Exs.B3 and B4 well established and after thorough investigation conducted by them found that, respondent No.1 ie., owner-cum-driver of the auto bearing No.AP-35-U-6576 has no valid and effective driving license and rightly issued legal notice under Ex.B3 which was served on respondent No.1 and thereby complied with the obligation cast on respondent No.2.

The further evidence of RW.1 is that the auto rickshaw is a transport vehicle and as such the driver of auto should possess badge with transport endorsement. The driver-cum-owner of auto is having LMV non-transport license only as on the date of accident, which is a clear violation of terms and conditions of the policy issued to respondent No.1. The further evidence of RW.1 is that, the respondent No.1 knowing fully well that he is not having valid and effective driving license on the date of accident, drove the auto bearing No.AP-35-U-6576 without satisfying the requirements of rule 3 of the Central Motor Vehicles Rules, 1989 and thereby violated the terms and conditions of the policy and committed wilful breach. Hence, the respondent No.2-Insurance Company is not liable to pay any compensation to the petitioner. The driving license issued by R.T.A., Vizianagaram, marked as Ex.B.5 and also examined the Record Assistant of R.T.A., Vizianagaram.

15. The clinching evidence of RW.2 is that in pursuance of the directions of the R.T.A., he produced driving license extract of R1, marked as Ex.X1 which is equivalent to Ex.B5, which is a non-transport driving license. Ex.X2 is the registration extract of R1, which is No.AP-35-U-6576, wherein the name of respondent No.1. is recorded as registered owner of the offending vehicle which is a

transport vehicle. According to the evidence of RW.2, respondent No.1 possessed license for light motor vehicle for non-transport and therefore, he was not authorised to drive offending vehicle at the time of accident, as it is a transport vehicle which certainly attract violation of M.V. Act and Rules.

During the cross examination, RW.2 admitted that as per Ex.X2, the weight of the offending vehicle is 526 kgs which comes under the definition of Light Motor Vehicle. As per Ex.X1, respondent No.1 was having license for light motor vehicle for non-transport and offending vehicle comes under the definition of light motor vehicle and the Company is not liable to pay compensation.

16. A combined reading of evidence of RWs.1 and 2 with Exs.X1 and X2 and also Ex.B5 go to suggest that respondent No.1 is the registered owner of the offending auto bearing No.AP-35-U-6576 and he possessed only light motor vehicle non-transport driving license. Admittedly, the auto is a light motor vehicle transport which require an endorsement to drive transport auto.

In the case of **NATIONAL INSURANCE COMPANY LIMITED Vs. SWARAN SINGH**[1], where the Apex Court held that, the vehicle was driven by a person who did not hold any license or held an invalid license, does not have any bearing on the liability of the insurance company. It was further observed that, in such an

[1] 2004 ACJ 1 (SC)

event, the insurance company has to meet the claim and thereafter, proceed against the owner, if it so desires. Similarly, in the case of **NEW INDIA ASSURANCE LIMITED Vs. PATAN NIZAM VALLI KHAN**[2], wherein it was also held that the Insurance company can pay and recover the amount from owner. No doubt, as per sections 141 and 142, the Tribunal has no power to order pay and recover. Since it is a beneficial legislation, the claimants are poor, they cannot be made to suffer by moving around the Courts. It is the duty of the Courts to equate, so far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation.

17. The Tribunal having considered the evidence of RWs.1 and 2 and the documentary evidence under Ex.B2, Ex.B5 and Exs.X1 and X2 came to right conclusion that the petitioners / claimants 1 to 3 are third parties to the contract and Ex.B.2 policy was in force by the date

[2] 2009 ACJ 153

of accident. Respondent No.1 only possessed light motor vehicle non-transport driving license. Whereas, the offending auto is the light motor vehicle which is a transport vehicle. Accordingly, respondent No.1 was having driving license only to drive non-transport light motor vehicle but he drove light motor vehicle transport which certainly amounts to violation of the Motor Vehicle's Act, Rules framed therein and also the terms and conditions of Ex.B1 policy. Therefore, the Tribunal rightly exonerated the appellant / respondent No.2 from its liability by virtue of Ex.B2 –insurance policy. However, found that the appellant / respondent No.2 cannot avoid its initial liability to pay and recover. Accordingly, ordered that respondent No.2-Insurance Company shall satisfy the decree /award in the first instance, and can recover the same from the respondent No.1 (owner-cum-driver of the auto bearing No.AP-35-U-6576). Thus, I do not find any error or irregularity in such finding of the Tribunal.

18. The further contention of the appellant is that, last but not the least, the Tribunal applied Multiplier-17 instead of Multiplier-16 for the age group of 35 years. The evidence of PW.1 is that she was 35 years by the date of accident. In Ex.A2-post-mortem report also the age of deceased-K.Suramma is noted as 35 years. Taking into consideration the age of the deceased as 35 years, the Tribunal applied Multiplier-17, which is error, apparent on the face of the record.

However, as per the judgement in the case of **Sarla Verma v. Delhi Transport Corporation**[3], the age group between 31 to 35 years, Multiplier-16 shall be applied. So, the Tribunal having considered the evidence on record considered Rs.24,000/- per annum the annual income for computing the compensation and after deducting 1/3rd towards her personal expenses, it comes to Rs.16,000/- and after calculation by applying M-16, it comes to Rs.16,000 x '16' = Rs.2,56,000/-. Further the Tribunal also rightly ordered Rs.5,000/- towards mental agony and Rs.2,500/- towards funeral expenses, thus, in total, the claimants are entitled to Rs.2,63,500/-. Since there is no counter filed by the claimants/respondents 1 to 3, I am not inclined to go into other particulars.

19. Accordingly, the appeal filed by the Insurance Company is partly allowed with costs, while setting aside and modifying the order and decree dated:12.3.2010 in O.P. No.294 of 2008 on the file of the II Additional District Judge (FTC)-cum-Motor Accidents Claims Tribunal, Parvathipuram, and passed the modified award for Rs.2,56,000/- with interest at 6% per annum from the date of petition till the date of realization against respondent No.1 and that the appellant/respondent No.2 shall pay award amount first and recover the same from the respondent No.1-owner-cum-driver of the offending vehicle thereafter, who shall deposit the same within one month from the date of receipt of a copy of the appeal judgment. On

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[3] AIR 2009 SUPREME COURT 3104

such deposit, petitioners 2 and 3/ respondents 2 and 3 herein are awarded an amount of Rs.1,00,000/- each and the same shall be deposited in any nationalised bank, till they attain majority. The bank in which the fixed deposits are made in the name of minor petitioners 2 and 3/respondents 2 and 3 herein is directed to renew the same from time to time according to their norms. The 1st petitioner/1st respondent herein is awarded an amount of Rs.56,000/- and he is permitted to withdraw the entire amount with entire accrued interest and proportionate costs.

20. Advocate fee is fixed at Rs.2,000/-.

21. Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE N. BALAYOGI

Dated:8 -06-2018
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HONOURABLE SRI JUSTICE N. BALAYOGI

M.A.C.M.A. No.1869 of 2010

DATED:8-06-2018

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