HON'BLE Dr.JUSTICE B.SIVA SANKARA RAO

MACMA No.2277 of 2016

ORDER

M/s Gunturu Engineering College represented by its Chairman-cum-owner of the crime vehicle bus bearing No.KIA 06A 3388 being R.1 including Insurer-R.2 and Driver of the bus-R.3 before the tribunal in the claim maintained by the two injured-claimants in M.V.O.P.No.317 of 2012 u/sec.166 of the Motor Vehicles Act,(for short, 'the Act') for compensation of Rs.19,00,000/-, aggrieved by the said award of the tribunal dt.24.02.2016 in awarding compensation of Rs.10, 47030/- with interest at 9%p.a. from the date of petition 09.02.2001 till the date of deposit in directing the Insurer-R.2 to deposit the said amount and recover the same from the owner of the vehicle i.e. claim petition , the owner of the vehicle, maintained the present appeal.

2. The contentions in the grounds of appeal are that the tribunal gravely erred in fixing the liability of pay and recovery and erred in holding that there is negligence on the part of the driver of the vehicle in the absence of any evidence to that, despite there is contribution mainly by the claimant and tribunal should have seen that the claimant failed to establish any negligence on the part of the driver of the offending vehicle and the tribunal also erred in holding that there is no valid driving licence and not marking the same though it was valid beyond the date of accident, and tribunal also erred in considering the age of the claimant as 19 years with no proof and erred in arriving income of Rs.45,000/- per month without any basis and thereby the award of the tribunal in fixing 90% disability on the claimant and fixing liability of pay and recovery is unsustainable.

3. The learned counsel for the appellant–owner of the vehicle supra in support of the contentions by reiterating the same mainly so far as pay

and recovery of liability among the other contentions concerned placed reliance on the three expressions of the Apex Court viz; NIC Vs. Swaran Singh[1], Lal Chand Vs. OICL[2] referring the 3JB expression Swaran Singh supra, and Mukund Dewangan v. Oriental Insurance Co. Ltd.[3] In which also referred to Swaran Singh supra.

4. Whereas, the Insurer to rebut said contentions saying that the tribunal rightly held as pay and recovery liability if otherwise the Insurer to be exonerated from the evidence on record, but for no cross-objections thereby in seeking not to enquire and to dismiss the appeal placing reliance upon NIC Vs. Vidhyadhar Mahariwala[4] Rambabu Tiwari Vs. United India Insurance Limited[5] UICL Vs. Anbari[6] and Eswar Chandra Vs. Oriental Insurance Co.Ltd.[7].

5. Heard and perused the material on record.

6. Before going into the correctness of the liability with reference to the legal propositions placed reliance respectively by the owner of the vehicle and the Insurer supra, coming to the quantum undisputedly the left leg of the injured claimant was amputated which is outcome of the accident and from the evidence of record, the tribunal assessed the disability which is issued by the Govt. of A.P. Medical Board disability certificate of 90% functional. So far as the percentage of disability concerned, from said evidence with reference to the disability certificate, there is nothing to interfere. Now coming to the correctness of the finding of the tribunal with the age of the injured, tribunal observed that the certificate issued by the Medical Board shows 20 years and from FIR and

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[1] 2004 SCJ page 1
[2] 2012 ACJ 2006
[3] 2016 4 SCC 298=(2017) 14 SCC 663
[4] 2008 ACJ page 2860
[5] 2008 ACJ 2654
[6] 2000 ACJ page 469
[7] (2007) ACJ 1067 (SC)

other material, the age mentioned by the claimant in the claim petition as 18 years. Thereby in taking the age of 19 years by the tribunal from the clinching evidence of between 19 to 20, there is also nothing to interfere.

7. Coming to the earnings of the injured as on the date of accident dt.25.08.2011, the claim of the claimant was he was a painter and earning Rs.10,000/- per month however he did not produce any proof as observed by the tribunal. He was proceeding on motor cycle of his own even from the manner of accident that reveals. It is therefrom the tribunal referring to the expression of the Apex Court in Ramachandrappa Vs. Manager, Royal Sundaram Alliance Insurance Company Ltd.[8] taken the earnings at Rs.4,500/- per month. Even otherwise as per the latest 5 JB expression of the Apex Court in NICL Vs. Pranav Sethi[9], it is not the actual earnings including of his prospective earnings also be taken into consideration. Way back in Latha Wadhwa vs. State of Bihar[10], the Apex Court held that even in the absence of proof of income and earnings, it can be reasonably estimated at Rs.3,000/- p.m. for any non-earning member and even for housewife as domestic contribution. From the age between 19 to 20 years of 40% increase as per the latest Constitution Bench judgment even 40% to which with proportionate increase to the date of the expression of Latha Wadhwa supra from the date of accident in August, 2011, Rs.4000/-+ 40% therein to be taken, thus, in fixing Rs.4,500/- by the tribunal from the above, there is nothing to interfere.

8. There remains the contention regarding the Insurer is liable to pay in toto or only to the extent of pay and recover, since that finding of the tribunal pay and recover including from the owner of the vehicle as appellant with no cross-objections by Insurer though the insurer contended

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[8] 2011 6 ALD SC 75
[9] 2017 ACJ 2700
[10] (2001) 8 SCC 197=AIR 2001 (SC) 3218

total exoneration in the absence of cross-objections, Insurer cannot get to be relieved.

9. From this, the expression of the 3 JB of the Apex Court in Swaran Singh supra which rules the field undisputedly even today that no way overruled much less by any larger Bench or equal Bench; even the latest 3JB expression of Apex Court in Shantilal Vs.Rajesh[11] referring to the previous latest expression of the 3JB in Mukund Dewangan supra held that once there is a valid driving licence whether it is transport or non-transport makes no difference to the Insurer to make liable but once there is no licence, the question of liability of the Insurer does not arise. From this coming to Swaran Singh supra particularly at para-43 sub para-20 of Mukund Devagan supra that reproduced reads as follows:

> 20. The learned Judges having considered the entire material and relevant provisions of the MV Act and conflict of decisions of various High Courts and this Court on the question of defences available to the insurance companies in defending the claims of the victims of the accident arising due to the harsh and negligent driving of the vehicle which is insured with the insurance companies, proceeded to record the following summary of findings: (Swaran Singh case, SCC pp. 341-42, para 110) "110.
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> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.
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> (ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.
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> (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the

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[11] 2017 8 SCC 590

insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

10. From the above, Swaran Singh para-110 supra, it is observed particularly from para-110(3) that the breach of policy condition that is disqualification of the driver or invalid driving licence of the driver as contained in Section 149 2(a)(ii) of the Act, has to be proved to have been committed by the insured for avoiding liability by the Insurer and without that the fact of the fake or invalid driving licence or disqualification of the driver for driving at the relevant time are not the defences available to Insurer against either insured or the third parties. To avoid its liability towards the insured, the Insurer has to prove the insured as guilty and failed to take reasonable care in the manner of satisfying the condition of the policy. Even in Lal Chand supra particularly at para-10 by referring to para-11 supra of the Swaran Singh observed the self-same and nothing more.

11. From the above, so far as the facts of the case concerned, R.W.1-employee of the Insurer stated that the driving licence is lapsed on 21.01.1992 and later it was renewed and so on the date of the accident, the driver has no valid and effective driving licence. He denied the suggestion of driver has valid driving licence on the date of accident. R.W.2-Senior Assistant of R.T.O office who brought the driving licence particulars of said driver which is marked as Ex.X.4 stated that the driver has a licence to drive heavy transport vehicle and it was taken in the year 1999 and it was valid up to 2001 later he did not renew the licence.

12. The award of the tribunal further shows particularly in para-9 page 4/8 that "*the Xerox copy of the licence has been filed and it reveals as if the driver has a valid and effective driving licence as upto 30.10.2014, it is marked in this case and there is no material to show that said xerox copy is a genuine one*". The tribunal therefrom observed that it is on the evidence of R.W.2 RTO-employee, it can be said that the driver has no licence at the time of the accident, so the Insurance Company is not directly liable to pay compensation and it can be recovered from R.1-owner of the vehicle. Said observation of the tribunal is not attacked practically in this regard by the owner of the vehicle. The claimants did not mark any driving licence to say that the driver got valid driving licence for the driver did not come to witness box. Undisputedly, the owner did not even confront R.W.1 with any driving licence if at all there is a valid driving licence. R.W.2 also not confronted with any driving licence if at all there is any valid driving licence. A person having personal knowledge of the facts i.e. the driver and owner when did not produce any valid licence and did not come to witness box is suffice to draw inference but for not having valid licence, even it is proved from the evidence of R.Ws.1 and 2 of the driving licence lapsed long back, they could have come to witness box and produce any document. Once such is the case suffice to say the owner is negligent in entrusting the vehicle to driver with no driving licence as his driving licence lapsed long back. Still there is force in the contention of the Insurer of not liable from the expressions placed reliance, however for there are no cross-objections filed the insurer, the answer is not entitled to avoid the liability that was fixed by the tribunal for cannot get better relief. Thereby the tribunal's finding of the Insurer is liable to pay and recover from the owner no way requires interference.

13. Accordingly and in the result, the appeal is dismissed. Whatever deposited by the owner is entitled by the Insurer to recover and proceed further if at all any balance.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:02.01.2018
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