THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

M.A.C.M.A. No.892 OF 2013

JUDGMENT:

This appeal is filed by the appellant/2nd respondent/insurance company aggrieved by the Order and Decree dated 24.11.2011 passed in M.V.O.P.No.847 of 2008 by the Principal Motor Accidents Claims Tribunal, Warangal (for short, the Tribunal).

2. For the sake of convenience, the parties are hereinafter referred to as they were arrayed before the Tribunal in the original petition.

3. The brief facts of the case are that the 1st petitioner is the wife and petitioners 2 & 3 are the major sons of the deceased-Yara @ Are Pedda Yellaiah. On information, 'Adthidar' arranged a DCM Van belonging to the 1st respondent and provided his driver/Krishna to transport the cotton bags of the deceased and some of his villagers. On 28.12.2007, the deceased and three of his villagers loaded their cotton bags in the offending van and while proceeding from N.T.R. Nagar to Warangal Grain Market and when it reached Nakkarambodu at about 8.00 hours, the driver noticed a vehicle coming in the opposite direction and in order to avoid an accident, applied brakes suddenly and due to jerk, the deceased and another/M.Ram Reddy fell on the road and sustained grievous injuries. The deceased and Ram Reddy were taken to M.G.M. Hospital at Warangal in 108 Ambulance and the deceased succumbed to injuries on 30.12.2007, while

taking treatment. The deceased was 40 years and earning Rs.6,000/- by cultivation at the time of the accident. The 1st respondent is the owner and he appointed Krishna as the driver and permitted him to drive the offending van on the date and time of the accident. The 2nd respondent is the insurer of the offending van. Hence, the petitioners filed the claim petition claiming compensation of Rs.7,50,000/-, payable by respondents 1 & 2.

4. Before the Tribunal, respondent No.1 remained *ex parte.* Respondent No.2 filed its counter denying the averments of the claim petition and contended that the amount claimed is excessive and prayed to dismiss the claim petition.

5. After considering the oral and documentary evidence on record, the Tribunal came to the conclusion that the accident occurred due to the rash and negligent driving of the driver of the DCM Van bearing No.AP 31T 9228 and awarded total compensation of Rs.3,56,000/-, i.e., Rs.3,36,000/- towards loss of income, Rs.10,000/- towards loss of consortium, Rs.5,000/- towards loss of estate & Rs.5,000/- towards funeral expenses, with interest @ 7.5% per annum from the date of petition till the date of realization, payable by both the respondents jointly and severally. Aggrieved by the said order, the appellant/2nd respondent/insurance company filed the present appeal.

6. Heard Sri T.Mahender Rao, learned standing counsel for the appellant/insurance company and Sri Ajay Kumar

Madisetty, learned counsel appearing for respondents 1 to 3/claimants.

7. Sri T.Mahender Rao, learned standing counsel for the appellant/insurance company, submits that the deceased cannot travel on the rear side of the van, if at all he is the owner of the goods vehicle, he can only travel along with his goods sitting in the cabin and since the deceased was travelling on the rear portion of the goods vehicle, he contributed to the alleged accident as it was gross negligence on his part. Learned standing counsel further contended that in the present case, as the deceased travelled on the DCM Van as a gratuitous passenger, the insurance company is not liable to pay any compensation and sought to set aside the Award of the Tribunal. By relying on the decisions of the Apex Court in **Sunita and others v. Rajasthan State Road Transport Corporation and another**[1] and **Manuara Khatun and others v. Rajesh Kr. Singh and others**[2]**,** the appeal has to be allowed to the extent that by fastening the liability on the owner of the crime vehicle for violation of policy conditions and that firstly the insurance company has to pay the compensation amount and then recover from the owner of the crime vehicle, as the deceased was unauthorized and gratuitous passenger, who was traveling in a goods vehicle and who are no way related to the goods in the vehicle and that the deceased is not traveling in the cabin and

[1] 2019 ACJ 801
[2] 2017 (2) ALD 65 (SC)

was traveling in the rear portion of the crime vehicle and that since the deceased himself has taken risk by traveling on the rear portion of the goods vehicle and the same has not been rebutted by the claimants in their evidence and thus, contributory negligence has to be fixed. It is further contended that first of all, it becomes immense necessary that whether the passenger is permitted to sit along with the goods on the rear side is the issue and it is an undisputed fact that the deceased was traveling sitting on the rear side of the DCM Van along with the loaded cotton bags and on applying sudden brakes by the driver, the deceased fell down and sustained injuries, later succumbed to death. It is further contended that the deceased would have saved his life if he was sitting in the cabin but not on the rear side. Accordingly, the deceased has contributed to the accident and his negligence has to be taken into account. Accordingly, prayed to allow the appeal.

8. Per contra, Sri Ajay Kumar Madisetty, learned counsel for respondent Nos.1 to 3/claimants, contended that the appellant/insurance company has neither produced any evidence nor made out a case fixing the contributory negligence on the part of the deceased except incorporating the legal provisions and also making a general statement. Though in para 4(c) of the impugned judgment, the contention of the insurance company is recorded by the Tribunal stating that the alleged accident took place due to gross negligence of the

deceased, but in para 14 of the judgment, the Tribunal has categorically observed that the accident has occurred due to the negligence of the driver of the 1st respondent/owner but not on account of the alleged negligence or contributory negligence of the deceased. Learned counsel further contends that the Tribunal passed a well reasoned order which needs no interference. He further submits that though the deceased travelled in the DCM Van as an unauthorized passenger, the liability of insurance company cannot be exonerated and hence, the Tribunal has rightly passed the Award, and the same does not need any interference. He further contended that even, for the sake of argument, the liability of insurance company is exonerated, the insurance company is still liable to pay the claimants at the first instance and then recover from the owner of the vehicle, in accordance with the decision of Hon'ble Supreme Court in **Anu Bhanvara v. Iffco Tokio General Insurance Company Limited**[3].

9. Since the driver of the 1st respondent/owner of the DCM Van ought to have taken steps in not allowing the deceased to sit in the rear side of the vehicle and he ought to have taken precautions, in the absence of which it cannot be held that the liability of contributory negligence need to be fastened on the act of the deceased. Hence, the entire liability and the compensation is confirmed in the light of **Anu Bhanvara**'s case (supra).

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[3] Laws (SC) 2019 8 40

10. Having considered the rival contentions, it is not in dispute that the DCM Van in question is a goods carriage vehicle; and at the time of accident, the deceased was traveling on the DCM Van as a gratuitous passenger, and there is no insurance coverage covering the risk of the claimant. It is also not in dispute that the insurance policy (Ex-B.1) was valid and subsisting as on the date of accident. Therefore, it can be said that the deceased travelled as a gratuitous passenger in the crime vehicle. In **Anu Bhanvara's** case, the Apex Court while dealing with the case of gratuitous passengers, directed the insurer to pay the awarded sum to the claimants therein and recover the same from the insured in the same proceedings. In view of the above, as the deceased travelled as a gratuitous passenger in the DCM Van, it is just and reasonable to invoke the principle of 'pay and recover'. Therefore, the finding of the Tribunal directing the insurance company and respondent No.4 herein to deposit the compensation amount jointly and severally is set aside.

11. In view of the foregoing discussion, the judgment and decree dated 24.11.2011 passed in M.V.O.P.No.847 of 2008 by the Principal Motor Accidents Claims Tribunal, Warangal, is modified to the extent of directing the appellant/insurance company to pay the compensation amount to the claimants/respondent Nos.1 to 3 in the first instance, and recover the same from the 4th respondent/owner of the DCM

Van. Except the said modification, the judgment and decreed passed by the Tribunal shall remain unchanged.

12. Accordingly, the Motor Accident Civil Miscellaneous Appeal is disposed of. There shall be no order as to costs.

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

T.AMARNATH GOUD, J

Date: 18th October, 2019

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