HE HONOURABLE JUSTICE G. SRI DEVI

M.A.C.M.A. No. 1860 of 2007

JUDGMENT :

Challenging the findings of the Chairman, Motor Vehicle Accident Claims Tribunal-cum-IV Additional Metropolitan Sessions Judge-cum-XVIII Additional Chief Judge, Hyderabad in O.P.No.1997 of 2003, dated 29.12.2006 in exonerating the insurance company, respondent No. 2 herein from liability of payment of compensation and fixing the liability only on the owner of the offending vehicle, respondent No. 1 and also seeking enhancement of the compensation, the present appeal is filed by the claimant.

2. On 07.01.2002 while the claimant was traveling in Jeep bearing No.AP 04 5121, owned by the respondent No. 1 and insured with respondent No. 2, the driver drove the vehicle in rash and negligent manner and dashed to one RTC bus, due to which the claimant sustained fracture to both bones of his right leg. Therefore, he laid a claim for Rs.6.50 lakhs towards compensation against the respondent Nos. 1 & 2 under different heads.

3. The Tribunal, considering the claim of the appellant-claimant, counter filed by the respondent No. 2-Insurance Company and on evaluation of oral and documentary evidence,

allowed the O.P. in part, awarding a total compensation of Rs.2,86,000/- along with costs and interest @ 7.5% per annum from the date of petition till the date of realization, to be deposited by the respondent No.1 alone, being the owner of the crime vehicle within one month from the date of said order. As the claimant was held to be a gratuitous passenger in the offending vehicle, the Insurance Company-respondent No. 2 was held not liable to pay the compensation.

4. Heard the learned counsel for the appellant and the learned Standing Counsel for the respondent No. 2. Perused the material available on record.

5. Learned counsel for the appellant submits that the quantum of compensation awarded by the Tribunal is on lower side and seeks enhancement of the same. It is further submitted that though the right leg of the claimant was amputated above the knee, which supports the medical evidence, the Tribunal awarded a lumpsum amount of Rs.2.00 lakhs towards permanent disability but the claimant is entitled to compensation under the head of loss of earnings and the Tribunal ought to have awarded the same by taking into consideration the age, income and avocation of the claimant. With regard to the findings of the learned Tribunal in

fastening liability of payment of compensation on respondent No. 1 alone and in exonerating the Insurance company from liability, the learned counsel for the claimant has contended that although the claimant traveled as unauthorised passenger in violation of terms of Ex.B.1 policy, in view of the judgment of the Apex Court in ***Anu Bhanvara v. Iffco Tokio General Insurance Company Limited***[1]**,** the insurance company cannot be exonerated from its liability and is liable to pay the compensation to the claimant at the first instance and then recover the same from the owner of the offending vehicle.

6. On the other hand, the learned Standing Counsel for the Insurance Company, respondent No. 2 herein has fairly admits that the Tribunal awarded lumpsum amount and the appellant is entitled to loss of earnings on account of the disability sustained by him. With regard to the liability is concerned, it is contended that the tribunal has rightly held that the claimant was travelling in the Jeep as unauthorised passenger and therefore, as there was breach of terms and conditions of Ex.B.1 policy by the owner of the vehicle i.e., respondent No. 1, the tribunal has rightly

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[1] Laws (SC) 2019 840

exonerated the insurance company from payment of compensation and the said finding needs no interference by this Court.

7. A perusal of the impugned order would show that the Tribunal has framed Issue No.1 as to whether the accident had occurred due to rash and negligent driving of the Jeep bearing No.AP 04 5221 by its driver, to which the Tribunal after considering the evidence of P.W.1 coupled with the documentary evidence, has categorically observed that the claimant sustained grievous injuries in the accident caused due to the rash and negligent driving of Jeep by its driver and has answered in favour of the claimant and against the respondents. Further, the insurance company has not produced any evidence on record to show that there was no negligence on the part of the driver of the Jeep. Therefore, I see no reason to interfere with the finding of the Tribunal in holding that the accident was occurred due to the rash and negligent driving of the Jeep by its driver.

8. In the light of the principles laid down in ***Raj Kumar Vs. Ajay Kumar and another***[2], it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should

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[2] MACD 2011 (SC) 33

always be made to award adequate compensation not only for the physical injury and treatment but also for the loss of earning, inability to lead a normal life and enjoy amenities, which would have been enjoyed but for disability caused due to the accident.

9. In order to establish his case, the appellant examined himself as PW.1 and the Doctor, who treated him, as P.W.2. P.W.2 in his evidence has categorically stated that the claimant has sustained Grade-3 C compound fracture both bone leg right side; Grade 3 A fracture of shaft femur on right side with vascular injury and the surgery was performed on the claimant and his right leg was amputated above the knee. The record also discloses that as per Ex.A8-disability certificate issued by the Medical Board, the claimant has sustained 78% disability as his right leg was amputated above the knee. However, the tribunal in its findings has observed that though the disability was shown at 78%, as the claimant is in Government Service he would get the same salary and thereby awarded only Rs.2.00 lakhs towards disability sustained by him. Looking into the nature of the injury sustained by the claimant and taking into consideration the disability certificate (Ex.A8), this Court is inclined to fix the functional disability sustained by the appellant at 50%. In view

of nature of disability sustained, the appellant is entitled to loss of earnings due to disability.

10. As per Ex.A7, the claimant was drawing salary of Rs.5,004/- per month. Therefore, this Court is inclined to take the income of the claimant at Rs.5,000/- per month. Taking the income of the appellant at Rs.5,000/- per month, the loss of earnings sustained by the claimant with the disability at 50% would be Rs.2,500/- per month. In view of the judgment of ***Sarla Verma Vs. Delhi Transport Corporation***[3], the suitable multiplier to be adopted for calculating the loss of earnings would be '15' as the claimant was aged about 40 years at the time of the accident. Therefore, the loss of earnings on account of his disability would be Rs.2,500/- x 12 x 15 = Rs.4,50,000/-. Hence, the claimant is entitled to Rs.4,50,000/- under the head of loss of earnings on account of the disability sustained by him instead of Rs.2.00 lakhs as awarded by the Tribunal towards disability.

11. So far as loss of amenities and loss of expectation of life is concerned in ***Kavita v. Deepak and others***[4]the Apex Court held that victims of accident, who are disabled either permanently or temporarily, adequate compensation should be awarded not only

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[3] 2009 ACJ 1298
[4] (2012) 9 SCC 604

for the physical injury and treatment but also for the loss of earning and inability to lead a normal life and enjoy amenities, which one would have enjoyed had it not been for the disability. The Supreme Court further held that the amount awarded under the head of loss of earning capacity is distinct and does not overlap with amount awarded for pain, suffering, loss of enjoyment of life and medical expenses. Relying upon the decision of ***Nizam's Institute of Medical Sciences v. Prasanth S.Dhananka***[5]**,** the Apex Court also held that "assuming the claimant's life expectancy to be 55 years, we deem it appropriate to award a sum of Rs.3,00,000/- under the head of loss of amenities and loss of expectation of life".

12. In the instant case, since the right leg of the claimant was amputated above the knee and was treated in various hospitals, this Court deems it fit to award a sum of Rs.1,00,000/- towards loss of amenities and loss of expectation of life. The other amounts awarded by the Tribunal i.e., Rs.5,000/- towards transportation, Rs.10,000/- towards extra nourishment, Rs.1,000/- towards damage of clothing and Rs.45,000/- towards medical expenses and Rs.25,000/- towards pain and suffering

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[5] (2009) 6 SCC 1

need no interference as they appear to be just and reasonable. Thus, in all the claimant is entitled to Rs.6,36,000/- towards compensation.

13. Insofar as the liability is concerned, as seen from Ex.B.1 policy, the offending vehicle was insured with the 2nd respondent and the policy was in force as on the date of accident. Even as per the evidence on record, the claimant was proceeding in the jeep and he comes under the category of unauthorized passenger and his risk is not covered by the policy. In similar circumstances, in the case of **Manuara Khatun v. Rajesh Kr. Singh**[6], the Hon'ble Supreme Court dealt with the case of gratuitous passengers and held that the claimants are entitled for an order against the insurer to pay the awarded sum to the claimants and then to recover the said amount from the insured in the same proceedings. Further, in a recent judgment in **Anu Bhanvara v. Iffco Tokio General Insurance Company Limited** (supra), the Hon'ble Supreme Court while dealing with the similar issue, by referring its earlier judgments in **National Insurance Co. Ltd. V. Baljit Kaur**[7] and **Manuara Khatun** (supra) apart from other judgments, invoked the principle of 'pay and recover', in the

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[6] (2017) 4 SCC 796
[7] 2004 ACJ 428

peculiar facts and circumstances of the case. In **Manuara Khatun** (supra), the Apex Court at para No. 16 held as under:-

> *"16. This question also fell for consideration recently in Manager, National Insurance Company Limited v. Saju P. Paul and another (2013 (2) ALD 95 (SC)), wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on fact that since the victim was traveling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view of the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of 'pay and recover'."*

14. In view of the above, the order of the Tribunal to the extent of exonerating the Insurance Company from the liability of payment of compensation is liable to be set aside and considering the principle "*pay and recover*". Hence, to that extent, the order of the learned Tribunal is set aside and the Insurance Company is directed to pay the compensation amount at the first instance to

the claimant and then recover the same from the owner of the vehicle i.e., respondent No. 1 herein.

15. Accordingly, the M.A.C.M.A. is allowed in part. The compensation amount awarded by the Tribunal is hereby enhanced from Rs.2,86,000/- to Rs.6,36,000/-. The enhanced amount shall carry interest at 7.5% p.a. from the date of passing of award by the Tribunal till the date of realization. However, following the doctrine '*pay and recover*', the Insurance Company-2nd respondent is directed to pay the compensation amount to the claimant, at the first instance and thereafter recover the same from the owner of the offending vehicle i.e., the 1st respondent without initiating any separate proceedings. On such deposit, the claimant is entitled to withdraw the said amount without furnishing any security. There shall be no order as to costs.

Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE G. SRI DEVI

08.08.2022
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HE HONOURABLE JUSTICE G. SRI DEVI

M.A.C.M.A. No. 1860 of 2007

DATE: 08-08-2022