

(2016) 08 AP CK 0032
In the Andhra Pradesh High Court
Case No : MACMA No. 615 of 2012

Bajaj Allianz General Insurance Co. Ltd.	APPELLANT
Vs	
Ande Sarawathi	RESPONDENT

Date of Decision : 12-08-2016

Acts Referred:

Citation : (2017) 1 AndhLD 160 : (2016) 2 AnWR 660 : (2017) 1 TAC 90

Hon'ble Judges : Sri U. Durga Prasad Rao, J.

Bench : Single Bench

Advocate : T. Mahender Rao, Advocate, for the Appellant; B.V. Krishna Reddy, Advocate, for the Respondent Nos. 1 to 4

Final Decision : Dismissed

Judgement

Sri U. Durga Prasad Rao, J. - Aggrieved by the Award dated 21.09.2008 in M.V.O.P.No.717 of 2008 passed by the Chairman, MACT-cum-I Additional District Judge, West Godavari, Eluru (for short "the Tribunal"), the 2nd respondent in the OP/Bajaj Allianz General Insurance Company Limited preferred the instant appeal.

2. The factual matrix of the case is thus:

(a) The case of the claimants is that on the intervening night of 10/11.06.2006 at about 2 AM, when the deceased-Ande Adinarayana Rao @ Ranga Babu along with his friend-Prathi Anjaneyulu (PW2) was going on motorcycle bearing No. AP 37 AJ 3461 belonging to 1st respondent, after crossing Rachuru village the deceased hit the road side electrical pole and died on the spot. On this plea, the claimants filed M.V.O.P.No.717 of 2008 under Section 166 of Motor Vehicles Act, 1988 (for short "M.V.Act") and claimed Rs.6,00,000/- as compensation against respondents 1 and 2 who are owner and insurer of the motorcycle.

(b) R1 remained ex parte.

(c) Respondent No. 2/Insurance Company filed counter denying all the material averments made in the petition and contended that as the deceased stepped into

the shoes of the insured, he is not a third party and his risk will not cover under the terms of the policy. R2 also contended that since the accident was occurred due to the fault of deceased himself the claim of legal representatives cannot be entertained. R2 further contended that insured has not paid any extra premium to cover the risk of the deceased and there is no special contract between the insured and insurer, R2 is not liable to pay any compensation. Finally, R2 contended that compensation claimed is highly excessive and exorbitant and thus prayed to dismiss the O.P.

(d) During trial, PWs.1 to 3 were examined and Exs.A1 to A5 were marked on behalf of claimants. RWs.1 and 2 were examined and Exs.B1 and B2 were marked on behalf of 2nd respondent.

(e) The Tribunal considering the oral and documentary evidence held that the deceased is not a third party as he stepped into the shoes of the owner but as the Insurance Company collected premium of Rs.50/- it will cover any person who stepped into the shoes of the owner and accordingly awarded compensation of 1 lakh with proportionate costs and interest at 7.5% p.a.

Hence, the appeal by Insurance Company.

3. The parties in this appeal are referred as they were arrayed before the lower Tribunal.

4. Heard arguments of Sri T. Mahender Rao, learned counsel for appellant/ Insurance Company and Sri B.V.Krishna Reddy, learned counsel for R1 to R4/ claimants. Though notice sent to R5/owner was served, but there is no representation on his behalf.

5. Challenging the award fastening liability on the Insurance Company to the extent of Rs.1 lakh, the main plank of argument of Sri T. Mahender Rao, learned counsel for appellant/Insurance Company is that by facts and evidence the deceased was not an employee under insured but he borrowed the vehicle from R1 and met with an accident and died due to his own fault and in that view his LRs. cannot lay any claim either under Section 163-A of MV Act since he was not a third party or under Section 166 because fault in the accident was with the deceased himself and therefore, the Tribunal ought to have dismissed the claim because policy would not cover his risk. He would alternatively argue that if it is held that Insurance Company is liable for the claim on the ground that the policy was in force under which it collected an additional amount of Rs.50/- to extend personal accident coverage to owner-driver and the deceased deemingly stepped into the shoes of the owner, still the liability of Insurance Company cannot be fixed more than Rs.1 lakh as contracted under Ex.B1-policy and the Tribunal in that event, ought not to have granted costs and interest against the appellant. He relied upon the following decisions to buttress his point that when the accident was occurred due to the fault of the deceased himself, his LRs. cannot lay claim under Section 163A of MV Act since he is not a third party.

1. Ningamma v. United India Insurance Company Limited, 2009 ACJ 2020 (SC);
2. Appaji (since deceased) and another v. M. Krishna ,2004 ACJ 1289 (Karnataka);
3. Oriental Insurance Company Limited v. Meena Variyal, 2007 ACJ 1284 (SC);

He thus, at the first instance, prayed to allow the appeal and dismiss the claim against the Insurance Company and alternatively to restrict liability of the Insurance Company to the extent of Rs.1 lakh.

6. Per contra, learned counsel for claimants supported the award and argued that by virtue of Ex.B1?policy, the Insurance Company is liable to pay Rs.1 lakh and since it did not come forward before the lower Tribunal to pay to the extent policy obligated it and on the other hand contested the OP tooth and nail, the lower Tribunal was justified in awarding costs and interest also and therefore, there are no merits in the appeal and the same may be dismissed.

7. In the light of above rival arguments, the point for determination is:

"Whether the award passed by the Tribunal fastening liability on the Insurance Company, is factually and legally sustainable?"

8. Point: As can be seen, in para-25 of its award the Tribunal considering evidence and relying upon the decision of the Apex Court in Ningamma?s case (supra) held that the deceased was not employee of R1 and he borrowed the motorcycle from its owner, met with accident and died due to his own negligence and therefore his LRs. cannot claim compensation under Section 163A of MV Act. I find no reason to differ with the said finding.

(a) In Ningamma?s case (supra) the facts are similar to the instant case, as in that case the deceased borrowed motorbike from the real owner, met with accident due to his fault and died. The Apex Court was then engaged with a question whether his LRs. in those circumstances would be entitled to compensation under Section 163A or under any other provisions of law. The Apex Court held that the deceased having borrowed the vehicle from the owner stepped into the shoes of the owner and since the owner himself cannot be a recipient of compensation, his LRs. would not be entitled to compensation under Section 163A.

(b) In Meena Variyal?s case (supra) the deceased was Regional Manger of Company which was the owner of the car and while travelling in the car he died when the car collided with a tree. His LRs. filed claim petition under Section 166 of MV Act and it turned out that the car was driven by deceased himself.

The lower Tribunal allowed compensation against owner and exempted the Insurance Company on the observation that since the deceased himself drove the car his risk was not covered. However, the High Court directed the Insurance Company to pay and recover in terms of decision in National Insurance Company Ltd. v. Swaran Singh, 2004 ACJ 1. When the matter was carried in appeal, the

Apex Court held that the deceased as Regional Manager of the Company used the vehicle, whether he is treated as owner of the vehicle or an employee, he was not covered under the insurance policy in the absence of any special contract and hence the Insurance Company would not be liable.

(c) In Appaji's case (supra) also a Division Bench of the Karnataka High Court held that when the accident to a two wheeler was caused due to the fault of the deceased himself, no claim under Section 163A of MV Act can be laid.

9. In the light of above authorities which have a direct bearing on the case on hand, the claimants cannot lay a claim under Section 163A of MV Act as contended by learned counsel for appellant/Insurance Company and there can be no demur in it. It should be noted that in the instant case, the claim was laid not under Section 163A but under Section 166 of MV Act i.e. under fault liability principle. When claim is laid as aforesaid, the burden of proof will be on the claimants to establish the fault of the concerned driver and owner of the vehicle. But in the instant case, admittedly the accident was occurred due to the fault of deceased himself, as already observed supra. Therefore, in the normal circumstances, the claimants will not be entitled to compensation under Section 166 also.

(a) However, that is not the end of the matter. Though the risk of the deceased was not covered as a third party, still his risk was covered under a special contract to grant compensation to his LRs. It should be noted, under Ex.B1 the Insurance Company collected additional premium of Rs.50/- to extend personal accident coverage for the owner/driver to an extent of Rs.1 lakh. Since the deceased while riding the vehicle stepped into the shoes of the owner, the benefit under the aforementioned special contract, in my considered view need not be deprived to the deceased. Here a question may arise whether the policy could be extended to the owner/driver in case of an accident caused due to his own fault. In my considered view, the answer would be 'yes' for the reason that hypothetically if an accident is caused to the owner while riding the insured vehicle due to the fault of another vehicle, he will claim compensation against the owner and insurer of the offending vehicle in which case he need not fall back on his own insurer basing on the additional premium paid by him. Therefore, the aforesaid additional premium squarely covers the instances where an accident is caused due to the fault of owner/driver himself. Since in the instant case the deceased deemingly stepped into the shoes of the owner, such benefit accrues to him also. Therefore, the lower Tribunal was right in awarding compensation.

10. Then, the alternative argument of Sri T. Mahender Rao is that in any event the liability of the Insurance Company cannot be extended beyond Rs.1 lakh and therefore no interest and costs can be awarded. He relied upon the decision of the Apex Court in *Oriental Insurance Company Limited v. Rajni Devi and others*, 2008 ACJ 1441 (SC). In the said citation the Apex Court in similar circumstances confined the liability of the Insurance Company in terms of contract of insurance

to Rs.1 lakh and made it clear that it was not liable to any sum exceeding the said amount. It is not discernible from the said decision whether interest was allowed or denied. In the instant case, the contention of the Insurance Company as can be seen from its counter was not to the effect that it was liable only to the extent of Rs.1 lakh and not more and on the other hand, it contested the matter for three years and therefore, the lower Tribunal in usual course awarded costs and interest against the Insurance Company. I therefore find no force in the contention of appellant that the Insurance Company should not be mulcted with interest and costs.

11. In the result, the MACMA filed by the Insurance Company is dismissed by confirming the award passed by the lower Tribunal in M.V.O.P. No. 717 of 2008.