(2009) 11 AP CK 0038

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No''s. 1967 of 2005 and 3248 and 4014 of 2009

Boppudi Anantha Laxmi and Others APPELLANT

Vs

K. Ambica Prasad and Another RESPONDENT

Date of Decision : 19-11-2009

Acts Referred:

Central Motor Vehicles Rules, 1989 — Rule 3
Motor Vehicles Act, 1988 — Section 166
Workmens Compensation Act, 1923 — Section 147, 95

Citation : (2011) ACJ 1775

Hon'ble Judges : V.V.S. Rao, J;B.N. Rao Nalla, J

Bench : Division Bench

Advocate : Ghanta Rama Rao, for the Appellant; C. Hanumantha Rayudu and Mr. Briz Mohan Singh, for the Respondent

Judgement

V.V.S. Rao, J.—These three appeals can be conveniently disposed of by common order as they are in relation to the motor accident that had occurred on 11.11.2001. C.M.A. No. 1967 of 2005 is filed by the claimants and C.M.A. No. 3248 of 2009 is filed by Oriental Insurance Co. Ltd. (''the insurer'', for brevity). Both these appeals are against O.P. No. 461 of 2002 on the file of the court of the Motor Accidents Claims Tribunal-cum-III Additional District Judge, Visakhapatnam. M.A.C.M.A. (SR) No. 31377 of 2005 is filed by insurer against O.P. No. 232 of 2003, which was filed by a person who was injured in the accident. The insurer claims exoneration from the liability under the policy of insurance. In both the appeals, claimants seek enhancement of compensation.

2. The accident occurred on 11.11.2001 at 9.30 a.m. On that day, Boppudi Venkateswararao, Acharya Srinivas, M. Kumar and others were travelling in a Tata Sumo bearing No. AP 31-M 778 from Gopala-patnam to Gajuwaka. The said vehicle belonged to M/s. Inturi Associates, a firm of Chartered Accountants, Visakhapatnam. When the vehicle reached Kakaninagar bus stop at 9.30 a.m., due to rash and negligent driving of the driver, it dashed against a pole on the road resulting in injuries to the occupants of the car. Venkateswararao suffered

serious head injuries. He was shifted to Latha Hospital, Gajuwaka and later to King George Hospital, Visakhapatnam. At 12.30 p.m., on the same day, he died due to grievous injuries. Acharya Srinivas sustained injuries like contusion and lacerated injury below left eye and he was shifted to Simhapuri Hospital for treatment. 3. The wife, minor son and parents of Venkateswararao instituted M.O.P. No. 461 of 2002 claiming sum of Rs. 50,00,000 (rupees fifty lakh) as compensation. They alleged that accident occurred due to rash and negligent driving of the driver. They further allege that Venkateswararao was aged 29 years and was earning Rs. 8,000 (rupees eight thousand) per month as Manager of Inturi Associates and that he was earning Rs. 13,000 (rupees thirteen thousand) as municipal contractor at Gajuwaka. The claim was opposed by insurer denying the negligence of the driver and disputing the quantum of compensation. The insurer filed additional counter later contending that the policy does not cover if the vehicle is used for hire and reward and the vehicle was insured for personal use.

4. The wife and three witnesses deposed for the claimants and Exhs. A1 to A7 and Exhs. XI to X6 were marked. Assistant Administrative Officer of insurer was examined as RW 1 and marked the policy as Exh. B1. The Tribunal rejected the plea of insurer and came to the conclusion that accident occurred due to negligence of the driver. No finding was, however, recorded as to the plea of insurer seeking exoneration. Considering the evidence, the Tribunal awarded Rs. 2,40,000. While doing so, the Tribunal applied Second Schedule to the Motor Vehicles Act, 1988, and took into consideration an amount of Rs. 15,000 (rupees fifteen thousand) as notional income per annum and applied multiplier of 18 for determining loss of dependency for Rs. 1,80,000 (rupees one lakh eighty thousand). Rs. 15,000 (rupees fifteen thousand) towards loss of consortium, Rs. 20,000 (rupees twenty thousand) towards loss to estate, Rs. 15,000 (rupees fifteen thousand) towards loss of love and affection and Rs. 10,000 (rupees ten thousand) towards funeral expenses are also granted.

5. Acharya Srinivas, the person who was injured, filed O.P. No. 232 of 2003 before the Court of VII Additional District Judge (Fast Track Court), Visakhapatnam. The insurer denied liability contending that the vehicle was used for commercial purpose and, therefore, the insurer stands exonerated. The injured gave evidence as PW 1 and marked Exhs. A1 to A3. Insurer examined RW 1 and marked Exh. B1. Considering the evidence of PW 1 and wound certificate, Exh. A2, the Tribunal concluded that the injured suffered simple injuries and awarded Rs. 11,000 (rupees eleven thousand). The insurer filed appeal with delay. By order dated 5.11.2008 in M.A.C.M.A.M.P. No. 4561 of 2005, the delay has been condoned.

6. The counsel appearing for the parties made their submissions touching upon the liability of the insurance company as well as the entitlement for the compensation as claimed. We have been taken through the evidence as well as the relevant decisions. From the pleadings before the Tribunal and the

submissions made before us, two points would arise for consideration, which are dealt with hereafter.

Liability of the insurer:

7. There is no dispute that the vehicle involved in the accident is owned by K. Ambica Prasad, respondent No. 1 in the O.Ps. The policy, Exh. B1, would show that it is a private car (zone A) Policy B Comprehensive and certificate-cum-policy schedule is in Form No. 51 of the Central Motor Vehicles Rules, 1989. The policy is subject to endorsements 71, 22, 24, 19, 70 and is also subject to the following limitations: "Use only for social, domestic and pleasure purpose and insured own business. The policy does not cover use for hire and reward, organised racing, speed testing and carriage of goods (other than samples) in connection with any trade or business or use for any purpose in connection with motor trade". Sections II and III of the ''Private Car Package Policy'' read as under:

Section II-Liability to third parties.-

(1) Subject to the limits of liability as laid down in the Schedule hereto, the company will indemnify the insured in the event of an accident caused by or arising out of the use of the vehicle against all sums which the insured shall become legally liable to pay in respect of-

(i) death of or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured;

(ii) damage to the property other than property belonging to the insured or held in trust or in the custody or control of the insured.

(2) The company will pay all costs and expenses incurred with its written consent.

(3) In terms of and subject to the limitations of the indemnity granted by this section to the insured, the company will indemnify any driver who is driving the vehicle on the insured''s order or with insured''s permission provided that such driver shall as though he/she was the insured observe, fulfill and be subject to the terms, exceptions and conditions of the policy insofar as they apply.

(4) In the event of the death of any person entitled to indemnify under the policy the company will in respect of the liability incurred by such person indemnify his/ her personal representative in terms of and subject to the limitations of this policy provided that such personal representative shall as though such representative was the insured observe, fulfill and be subject to the terms, exceptions and conditions of this policy insofar as they apply.

(5) The company may at its own option:

(A) arrange for representation at any inquest or fatal inquiry in respect of any death which may be the subject of indemnity under this policy; and

(B) undertake the defence of proceedings in any court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this policy.

Section III-Personal accident cover for owner-driver.-The company undertakes to pay compensation as per the following scale for bodily injury/death sustained by the owner-driver of the vehicle, in direct connection with the vehicle insured or whilst driving or mounting into/dismounting from the vehicle insured or whilst travelling in it as a co-driver, caused by violent accidental, external and visible means which independent of any other cause shall within six calendar months of such injury result in:

Nature of injury

Scale of compensation

(i) Death

100 per cent

(ii) Loss of two limbs or sight of two eyes or one limb and sight of one eye

100 per cent

(iii) Loss of one limb or sight of one eye

50 per cent

(iv) Permanent total disablement from injuries other than named above

100 per cent

Provided always that

(a) compensation shall be payable under only one of the items (i) to (iv) above in respect of the owner-driver arising out of any one occurrence and the total liability of the insurer shall not in the aggregate exceed the sum of Rs. 2,00,000 during any one period of insurance.

(b) no compensation shall be payable in respect of death or bodily injury directly or indirectly, wholly or in part arising or resulting from or traceable to (1) intentional self-injury, suicide or attempted suicide, physical defect or infirmity or (2) an accident happening whilst such person is under the influence of intoxicating liquor or drugs.

(c) such compensation shall be payable directly to the insured or to his/her legal representatives whose receipt shall be the full discharge in respect of the injury to the insured.

(2) This cover is subject to:

(a) the owner-driver is the registered owner of the vehicle insured herein;

(b) the owner-driver is the insured named in this policy;

(c) the owner-driver holds an effective driving licence, in accordance with the provisions of rule 3 of the Central Motor Vehicles Rules, 1989, at the time of the accident.

8. A perusal of the above would show that even if the private car is insured comprehensively, whether or not it covers the third parties travelling in the car is matter of construing the policy. If the owner of the car has paid extra premium for the occupants of the car, certainly, the insurance company is liable. If no such extra premium is paid as per the policy subject to condition in section III as above, it is only the owner-driver of the vehicle, who is covered, again subject to the conditions as contained in proviso thereto. Section II (1) is to the effect that subject to limitations of liability as laid down in Schedule, the insurer will indemnify the insured in the event of accident.

9. The schedule of premium in policy, Exh. B1, would show that premium was paid to cover the liability to public, liability for paid driver and for third party property damage (TPPD) for unlimited account. No extra premium was paid to cover passengers travelling in the vehicle. A contention is raised by the counsel appearing for the dependants of the deceased and the counsel for the injured that M/s. Inturi Associates is a chartered accountants firm in which the owner of the car Ambica Prasad was partner and that the deceased Venkateswararao and injured Acharya Srinivas and others were employees of M/s. Inturi Associates and they were travelling to attend to the work of Ambica Prasad who himself had the business. Ambica Prasad filed a counter, but he did not choose to depose before the Tribunal. Therefore, the self-serving evidence of PW 4, who is a chartered accountant of M/s. Inturi Associates, cannot be relied on. There is no corroboration at all to show that the persons were travelling in the car to attend to the work of Ambica Prasad. Exhs. A8 and A10 are two income tax returns of the deceased Venkateswararao. The salary income from M/s. Inturi Associates has been shown. Exh. A8 was filed after the death by the mother of the assessee and Exh. A10 was filed ten days prior to death. Therefore, much credence cannot be granted to these. PW 4, who appears to be partner of the firm, did not produce any evidence from his office to show that deceased was Manager of his firm. Therefore, this court is not able to accept the plea of the claimants that the deceased was an employee of M/s. Inturi Associates or that employees of the said firm were travelling to attend to the firm''s business.

10. The question whether insurer is liable for the death of occupants of a private car in the event of accident even when extra premium is not paid, is no more res Integra. In The Oriental Insurance Company Limited Vs. Meena Variyal and Others, , the Supreme Court considered the question whether in the absence of a special contract, insurance company can be asked to pay the compensation awarded on the strength of the policy in terms of the Act. In the same case,

Suresh Chandra Variyal, who was working as a Regional Manager of a Savings Company, died in a motor accident on 14.6.1999. The car and driver were provided by the government. The wife and daughter claimed compensation u/s 166 of the Act. The Tribunal determined Rs. 7,20,000 as compensation payable but held that insurance company was not liable as there was no special contract and that the deceased himself was driving the vehicle. The High Court of Uttaranchal reversed the award of the Tribunal placing reliance on National Insurance Co. Ltd. Vs. Swaran Singh and Others, . Before the Supreme Court, it was contended by insurer that as there was no special contract and the policy was in terms of the Act Policy, insurance company cannot be asked to pay the amount awarded. The Supreme Court elaborately considered the question and held that:

(20) We are thus satisfied that based upon the ratio in National Insurance Co. Ltd. Vs. Swaran Singh and Others, , the insurance company cannot be made liable in the case on hand to pay the compensation first and to recover it from the insured, the owner of the vehicle. Deceased being an employee not covered by the Workmen''s Compensation Act, of the insured, the owner of vehicle, has not to be covered compulsorily under the Act and only by entering into of a special contract by the insured with the insurer could such a person be brought under coverage...

11. In The Branch Manager, United India Insurance Co. Ltd. Vs. Kondakotla Saroja, , a Division Bench of this court considered whether insurance company is liable to pay the compensation for the passengers travelling in the motor vehicle, which is covered by Act Policy. The Division Bench referred to Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Company, 1977 ACJ 343 (SC) and The Oriental Insurance Company Limited Vs. Meena Variyal and Others, and laid down that unless extra premium for the passengers who travelled in the vehicle is paid, the insurer cannot be held liable to pay the compensation and that the owner of the vehicle alone is liable to satisfy the decree and pay the compensation. Paras 19 and 20 of the reported judgment are extracted hereunder:

(19) In the case of Pushpabai Purshottam Udeshi''s case, 1977 ACJ 343 (SC), the Supreme Court after referring to the provisions of section 95 (a) and 95 (b) (i) of the Act laid as under:

''(22) Therefore, it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward. As u/s 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured the plea of the counsel for the insurance company will have to be accepted and the insurance company held not liable under the requirements of the Motor Vehicles Act.''

(20) The decisions upon which reliance has been laid by the learned counsel for the respondents-claimants are contrary to the ratio laid down by the Supreme

Court and, therefore, the same cannot be taken into consideration to fix the liability on the insurance company. Further, the Apex Court in The Oriental Insurance Company Limited Vs. Meena Variyal and Others, , after interpreting section 147 of the Act accepted the ratio as laid down in Pushpabai Purshottam Udeshi''s case (supra). Once the insurance company under cover note, Exh. A5, has not undertaken the liability by collecting extra premium for the passengers who travelled in the insured vehicle, it cannot be held liable to pay the compensation and it is only the respondent-owner of the vehicle who is liable to satisfy the decree and pay the compensation amount.

12. As noticed supra, no extra premium was paid to cover the risk of occupants of the car. Therefore, the insurer cannot be made liable and it is only the owner of the motor vehicle, respondent No. 1, who is liable to pay compensation.

Payable compensation:

13. In O.P. No. 461 of 2002 filed by the dependants of deceased Venkateswararao, Tribunal disbelieved the evidence of PW 1, PW 3 and PW 4 as well as Exhs. XI to X3, A6 and A7, and came to the conclusion that the claimants failed to produce satisfactory evidence with regard to income of the deceased. Placing reliance on Prabodh Chand Tyagi and Another Vs. Delhi Transport Corporation and Another, , the Tribunal considered notional income and determined the compensation including loss of dependency at Rs. 2,40,000. The learned counsel for claimants in O.P. No. 461 of 2002 has taken up through oral and documentary evidence, which was produced before the Tribunal. He has also relied on additional evidence sought to be brought on record vide the miscellaneous application being M.A.C.M.A.M.P. No. 3309 of 2005.

14. It is not necessary to receive additional evidence for rendering judgment based on the record available. Be that as it may, after perusing this evidence, we are convinced that the learned Tribunal was in error in determining the loss of dependency based on notional income as per Second Schedule to the Act and ignoring the evidence on record. Be it noted that in every case decided based on the evidence, it is quite possible that the parties may bring in evidence, it may be admissible or inadmissible. Merely because there is more inadmissible evidence, a judicial authority cannot ignore the admissible evidence and record conclusions on surmises. We are satisfied that the learned Tribunal ignored important evidence available on record. Therefore, insofar as the quantum of compensation awarded is concerned, we are inclined to set aside the award and consider the compensation payable to the dependants of the deceased based on the independent evidence.

15. Accident occurred on 11.11.2001. It was alleged that the deceased was Manager in a Chartered Accountants firm and was earning Rs. 8,000 per month. It was also alleged that he was earning more than Rs. 30,000 per annum by working as a contractor. PW 1. who is wife of deceased and PW 4, who is partner of the firm and also maternal uncle of the deceased, gave oral evidence. They

also marked Exhs. A4. salary certificate, A6 and A7 (registration granted by Gajuwaka Municipality) and Exhs. X5 and X6, income tax returns. PW 1 and PW 4 are family members and, therefore, it is not safe to rely on their evidence. Exh. X5 is income tax return, which was filed by the mother of the deceased after death of her son. If it is excluded, we are left with Exh. X6, income tax return, which was filed by the deceased for the assessment year 1999-2000. As per this, he was drawing a salary of Rs. 48,000 per annum. The income tax return for the year 2001-2002, Exh. X5, shows that deceased was drawing salary of Rs. 72,000 per annum. PW 4 deposed that deceased was earning Rs. 8,000 per month w.e.f. April 2001. Taking Exh. X5 and evidence of PW 4 into consideration, a reasonable inference can be drawn that though deceased was drawing an amount of Rs. 6,000 per month, he was paid Rs. 8,000 w.e.f. April 2001. As the claimants produced a bunch of work orders issued by Gajuwaka Municipality as Exh. A1, on probabilities, we feel that determining salary of deceased at Rs. 6,000 per month would be justified. Income tax returns would show that deceased was born on 1.6.1973 and, therefore, as on the date of death, he was about 29 years of age. As per the latest judgment of Supreme Court in Sarla Verma v. Delhi Transport Corporation, 2009 ACJ 1298 (SC), appropriate multiplier would be 17 and as held therein if the number of dependent family members is 4 to 6, 1/4 th has to be deducted from the loss of dependency. The claimants would also be entitled for non-pecuniary damages by way of award on conventional figures. Keeping this factor into consideration, we proceed to determine the compensation as below.

16. The annual income of the deceased would be Rs. 72,000 (Rs. 6,000 x 12). Even if one-fourth has to be deducted in which event, it would be Rs. 54,000 (Rs. 72,000 -Rs. 18,000). Thus for the purpose of calculation, multiplicand would be Rs. 54,000. This has to be multiplied with multiplier 17 and total loss of dependency would be Rs. 9,18,000 and to this we have to add Rs. 15,000 towards loss of consortium to claimant No. 1 (wife) and Rs. 15,000 for loss to estate. As there was no evidence adduced regarding the funeral expenses incurred or transportation charges, we are not inclined to award any amount under these heads. In all, claimants would be entitled to Rs. 9,48,000. There is no doubt that the claimants have already withdrawn some amounts, which were deposited by the insurance company. Keeping this in view, we hold that claimants would be entitled to interest at 6 per cent per annum from the date of the award passed by the Tribunal till the date of payment of the amount, after deducting the amount already withdrawn by the claimants.

17. Insofar as C.M.A. (SR) No. 31377 of 2005 filed by the insurance company against the award in O.P. No. 232 of 2003 is concerned, in view of the holding on first point that insurance company is not liable to pay compensation as there was no special contract, the appeal has to be allowed.

18. Accordingly, C.M.A. No. 3248 of 2009 and C.M.A. (SR) No. 31377 of 2005 are allowed. C.M.A. No. 1967 of 2005 is disposed of, modifying the award as indicated hereinabove but insurer would not be liable to pay compensation

awarded hereinabove. It shall be open to claimants to recover the same from owner of Tata Sumo bearing No. AP 31-M 778. There shall be no order as to costs.

