
(2015) 02 AP CK 0038

In the Andhra Pradesh High Court

Case No : M.A.C.M.A No. 451 of 2009

Cholamandalam M.S. General Insurance Company Limited

APPELLANT

Vs

Mamidiseti Satish and Others

RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:

Motor Vehicles Act, 1988 — Section 128, 166

Citation : (2015) 2 AnWR 44

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

Bench : Single Bench

Advocate : Kota Subba Rao, for the Appellant; A. Veera Swamy, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

U. Durga Prasad Rao, J.—Aggrieved by the Award dated 01.07.2008 in O.P. No. 473 of 2007 passed by the Chairman, M.A.C.T-cum-District Judge, Eluru (for short "the Tribunal"), the 3rd respondent in the O.P/Cholamandalam M.S General Insurance Company Limited preferred the instant MACMA.

2. a) On factual side, on 21.08.2006 when the claimant along with his friend-- Kayala Ramu was travelling in a motorcycle bearing No. AP 16 AK 5118, one Muppidi Durga Devi (claimant in MVOP. No. 50/2007) requested for lift and boarded the bike and while they were proceeding towards Prattipadu ring road, a Toyota Innova Car bearing No. AP 13 X 1443 being driven by its driver in a rash and negligent manner and at high speed and dashed the motorcycle. As a result of which, the petitioner and two others fell down on the road and claimant sustained grievous injuries. It is averred that the accident was occurred due to the fault of driver of the car. With these averments, the claimant filed O.P. No. 473 of 2007 under Section 166 of Motor Vehicles Act, 1988 against respondents 1 and 2, who are the driver and owner and respondent No. 3 who is the insurer of the offending car and claimed Rs. 4,86,000/- as compensation.

- b) Respondent Nos. 1 and 2 remained ex parte.
- c) Respondent No. 3/Insurance Company filed counter denying all the material averments made in the petition and urged to put the claimant in strict proof of the same. R3 denied the avocation and income of the injured. R3 also contended that as the accident occurred due to the fault of motorcyclist, claim against R3 is liable to be dismissed. Finally, R3 contended that the compensation claimed is highly excessive and thus prayed to dismiss the O.P.
- d) During trial, PWs.1 to 3 were examined and Exs.A1 to A13 were marked on behalf of claimant. No oral or documentary evidence was adduced on behalf of respondents.
- e) The Tribunal on appreciation of both oral and documentary evidence on record, has awarded total compensation of Rs. 4,86,000/- with costs and interest at 7.5% p.a. against respondents 1 to 3.

Hence, the appeal by Insurance Company.

3. The parties in this appeal are referred as they stood before the Tribunal.

4. Heard arguments of Sri Kota Subba Rao, learned counsel for appellant/ Insurance Company and Sri A.Veerasswamy, learned counsel for respondent No. 1/ claimant. R2/driver is not necessary party in this appeal vide Cause Title. Notice sent to R3/owner was unserved.

5. Challenging the award, learned counsel for appellant/Insurance Company contended that the seating capacity of the motor cycle is only two in all but at the time of accident the rider i.e., claimant herein was having triple riding in contravention of Section 128 of M.V. Act and thereby he equally contributed for the accident and hence the Tribunal ought to have fixed the liability for his contributory negligence as 50%. Incidentally he submitted that in connected O.P. No. 50 of 2007 (MACMA No. 3809 of 2009) filed by another pillion rider, learned MACT-cum-IV Additional District Judge, Tanuku relying upon the decision of this High Court reported in United India Insurance Company Limited vs. K. Anjaiah 2004 (1) LS 332 held that the rider of the motor cycle contributed to an extent of 25% for the accident and though the Insurance Company challenged the said finding in MACMA No. 3809 of 2009 on the ground that the Tribunal ought to have fixed 50% of liability on the rider of motorcycle, still the appellant is bringing the facts concerning to said case to submit that in the connected case some liability is fixed on the rider of the motorcycle towards his contributory negligence. He submitted that the Tribunal without noticing the judgment of our High Court on the point in issue held as if there was no contributory negligence on the part of the motor cycle rider. He thus prayed to fix 50% of liability on the claimant who is the rider of motor cycle.

a) Next, learned counsel challenged the quantum of compensation as high. Showing instances he argued that the disability is shown on high side as 50% and compensation was calculated accordingly. Similarly, without there being any

proper proof, an amount of Rs. 20,000/- was awarded towards future medical expenditure. He thus prayed to revise the compensation.

6. Per contra, learned counsel for 1st respondent/claimant while supporting the award submitted that the owner and insurer have not adduced any independent evidence to establish that the rider of the motorcycle contributed for the accident and taking the said fact into consideration, the Tribunal rightly held that mere violation of Section 128 of M.V. Act, per se will not amount to contributory negligence and hence the appellant cannot now challenge the said finding.

a) Regarding the quantum of compensation, learned counsel argued that the claimant suffered in all seven (7) fractures which resulted in permanent disability in his right lower leg and thereby he is now unable to attend his lorry driver's profession and taking these facts into consideration, the Tribunal rightly fixed the compensation. He thus prayed to dismiss the appeal.

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

"Whether the award passed by the Tribunal is factually and legally sustainable?"

8. POINT: The accident, involvement of the motorcycle bearing No. AP 16 AK 5118 and Toyota Innova Car bearing No. AP 13 X 1443 are not in dispute.

9. The first argument of the appellant is concerned, the evidence of PW.1 is that on that fateful night, he was riding the motorcycle and his friend Kayala Ramu was the pillion rider and while they were returning from Prattipadu at about 9:30 pm, on the way one Muppidi Durga Devi (claimant in MVOP. No. 50/2007) requested them to give lift and so they accommodated her and when they were proceeding towards Prattipadu ring road, the offending Innova car came in the opposite direction at high speed and dashed their bike and thus caused the accident. This is the evidence of the claimant on the manner of accident. The respondents in the O.P did not adduce any evidence.

a) Then answering the Issue No. 1, the Tribunal having observed that the respondents have not adduced any contra evidence and by relying on the judgment of Madhya Pradesh High Court reported in *Devi Singh Vs. Vikram Singh and Others*, (2008) ACJ 393 : AIR 2008 MP 18 : (2007) ILR (MP) 1323 : (2011) 1 JCR 546 : (2008) 1 JLJ 68 : (2007) 4 MPHT 535 : (2008) 3 MPJR 5 : (2008) 1 MPLJ 98 held that mere violation of Section 128 of M.V. Act does not constitute contributory negligence and accordingly fixed entire liability on the car driver.

b) Hence now the question is whether said finding is correct in the light of the argument of appellant. In this case, admittedly the claimant was taking two more pillion riders in violation of Section 128 of M.V. Act. Section 128 of M.V. Act reads thus:

"Section 128 - Safety measures for drivers and pillion riders:

(1) No driver of a two-wheeled motor cycle shall carry more than one person in

addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures.

(2) In addition to the safety measures mentioned in sub-section (1), the Central Government may, prescribe other safety measures for the drivers of two-wheeled motor cycles and pillion riders thereon."

c) So the crucial question is whether violation of Section 128 of M.V. Act, per se amounts to contributory negligence or not. In this context, in Devi Singh's case 2008 ACJ 393 (MP) relied upon by the Tribunal, the Full Bench of Hon"ble Madhya Pradesh High Court gave its findings thus:

"Accordingly, our answers to the questions referred to us are:

(1) Violation of Section 128 of the Act, per se, by a motor cyclist does not raise a presumption of contributory negligence on his part;

(2) Similarly, violation of Section 128 of the Act per se does not amount to contributory negligence on the part of the pillion riders.

(3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates Section 128 of the Act."

So in its opinion, mere violation of Section 128 of M.V. Act, per se, will not amount to contributory negligence. Be that it may, in United India Insurance Co. Ltd. Vs. K. Anjaiah and Others, (2004) 4 ALD 444 , a learned Judge of this High Court relying upon the decision of a Division Bench of Madras High Court in the case of Managing Director, Tamil Nadu State Transport Corporation, (Coimbatore Division-I) Ltd. Vs. Abdul Salam, Jameela, Laila, Sainabha, Kabeer, Meharaj and P. Selvaraj, (2004) ACJ 1827 : (2003) 2 LW 75 , with reference to Section 128 of M.V. Act has observed as follows:

"A plain reading of the above provision, it is clear that triple riding is prohibited on a two wheeler. When a statutory bar imposed under the Act, it is not made to be ignored by the riders of two wheelers, but to be followed in their own interest and safety. Though it has come in the evidence of PW-2 who claims to be an eye-witness to the accident that on the fateful day the driver of the accident lorry drove the lorry in a rash and negligent manner resulting in accident, but it is common understanding that one will certainly feel discomforted when riding a two wheeler with two pillion riders and naturally his balance over the vehicle will be limited by reason of accommodating two pillion riders and he will not have that ease and comfort of riding with one pillion rider. In the instant case, it is admitted that there was triple riding on the scooter. Under those circumstances, even in the absence of independent evidence adduced by the Insurance Company that the accident had occurred due to triple riding, it can be reasonably presumed that the rider of the scooter was discomforted by reasons of allowing two pillion riders and thus contributed in causing the accident. (Emphasis supplied) Had he been riding the scooter with one pillion rider, probably he would

have averted the accident by swerving the scooter to the extreme left side, but could not do so probably, his hands and legs movement was limited due to the congestion. In such view of the matter, the culpability in causing the accident is fixed at 75% on the part of the driver of the accident lorry and 25% on the part of the rider of the scooter. I am fortified in my view by the decision *Managing Director, Tamil Nadu State Transport Corporation v. Abdul Salam* (supra), wherein at Paras 10 and 11, it was held thus:

"We are concerned as to whether such action of the individuals is permissible under law. The motor cycle and any other two wheelers are meant only for two persons, the rider and a pillion rider. If more than two persons are travelling in a motor cycle or any other two wheeler, undoubtedly such action of the individual would become illegal and unauthorized. It is an awful sight when we come across three persons travelling in a motor cycle. They are sitting in such a cramped manner that the rider of the motor cycle almost sitting on the petrol tank or at the front edge of the seat. When he was sitting in such a position, naturally because of the restricted movement of his legs, he cannot have the complete control over the brake. The movements of his hands also so restricted. When that be so, this Court is of the opinion that definitely the rider of the two wheeler cannot have full control over the vehicle. There is no gain saying that now-a-days it has become the normal course that three persons, are travelling in a motor cycle."

In the above decision, learned Judge felt that triple riding will certainly cause any amount of discomfort to the rider and it will effect his ability to balance the vehicle and hence even in the absence of independent evidence adduced by the Insurance Company showing the fault of the rider, still it can be reasonably presumed that the rider has contributed for causing the accident. Learned Judge observed that had the rider proceeded with one pillion rider, probably he would have averted the accident by swerving the scooter to extreme left side but because of restriction of his limbs due to congestion he could not do that.

d) In my honest view, of the above decisions on the issue, the decision rendered by learned Judge of this High Court besides being the judgment of this High Court, takes into consideration the factual scenario in deciding the guilt of the motor cycle rider. In view of the presidential law emerged from this High Court and which is more pragmatic one, I hold that the same has to be followed since the judgment of other High Court will be of only persuasive effect. When applying the above judgment to the facts of the present case, admittedly the claimant was making a triple riding. That is not the end of the matter. The riding was in the night time on the ring road and an unknown third lady was also accommodated on the motor cycle. Since she is a third party and a lady, naturally the discomfort will be much more to the rider of the motorcycle. Therefore, the chances of his losing balance was more and to establish the same, independent evidence is not necessary.

e) In the above circumstances, the liability of the claimant being the rider of the

motorcycle is fixed as 25% and rest of 75% on the car driver.

10. So far as the second argument is concerned, the record shows that the claimant suffered multiple fractures and consequent disability. The evidence of the doctors in this regard is clear and acceptable. So on a careful scrutiny of the evidence on record, I do not find any excessiveness in the compensation awarded under different heads. Hence, the said argument of appellant is rejected.

11. In the result, this MACMA is partly allowed and the respondents in the O.P are directed to pay only 75% of the compensation awarded by the Tribunal with costs and interest @ 7.5% p.a.

As a sequel, miscellaneous applications pending, if any, shall stand closed.