
(2006) 12 AP CK 0054
In the Andhra Pradesh High Court
Case No : CMA No. 1420 of 2001

Gosala Ramadevi and Others

APPELLANT

Vs

P. Sivanarayana and Another

RESPONDENT

Date of Decision : 15-12-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 166
Workmens Compensation Act, 1923 — Section 3

Citation : (2007) 3 ALD 634

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : D. Kodandarami Reddy, for the Appellant; J. Seshagiri Rao and B. Venkataratnam, for the Respondent

Final Decision : Allowed

Judgement

C.Y. Somayajulu, J.—Appellants, who are the wife, parents, grand parents and son of Gosala Ramana (the deceased) who died in a motor vehicle accident filed a claim petition u/s 166 of the Motor Vehicles Act, 1988 (the Act), seeking compensation of Rs. 4,00,000/- from the respondents who are the owner and insurer of the Jeep which was being driven by the deceased himself at the time of the accident on the ground that the deceased was earning Rs. 3,000/- per month as salary. First respondent chose to remain ex parte. Second respondent filed its counter inter alia contending that inasmuch as the owner violated the terms of the policy issued by it by permitting 13 people to be carried in the Jeep when its capacity is only "10". It is not liable to pay compensation and that the appellants have to prove that they are entitled to the compensation claimed. In support of their case, appellants examined the second appellant as P.W.1 and marked Exs.A1 to A5. No evidence either oral or documentary was adduced on behalf of the second respondent. The Tribunal held that inasmuch as the deceased himself was responsible for the accident, the appellants are not entitled to any compensation and dismissed the claim petition. Hence this appeal.

2. The point for consideration is whether the appellants are entitled to any compensation, if so, to what amount ?

3. The fact that the deceased was driving the vehicle at the time of the accident is not denied or disputed. Ex. A. 1, First Information Report issued in connection with the accident, shows that it was registered on a report given by the person who took the Jeep on hire. It shows that the deceased drove the Jeep in a rash and negligent manner at a high speed, and dashed it against an electrical pole resulting in injuries to some of the persons travelling in the Jeep and also to the deceased and when the deceased was shifted to the Government hospital, he was pronounced dead. PW1 in fact is not a witness to the accident. The learned Counsel for the appellant by strongly relying on *The New India Assurance Company Ltd., Vijayawada Vs. Doredla Satyanarayana and others*, ; *Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others*, , *Sitabai and Others Vs. Ishak Hussain and Another*, ; *Adhikarala Jagadeeswara Rao Vs. Gopala Krishna Transport and Others*, and *National Insurance Co. Ltd. v. Prembai Patel* AIR 2005 SCW 2254, contended that the appellants are entitled to the compensation claimed in spite of the fact that the deceased was rash and negligent while driving the jeep at the time of accident, because the insurance covers the risk of the driver also.

4. In *D. Satyanarayana's* case (*supra*), a Division Bench of this Court held that since the insurer will be liable for compensation to driver u/s 3 of Workmen's Compensation Act, even if the driver was negligent at the time of the accident, his rash and negligent driving is not a ground to deny compensation to him because the insurer is liable to indemnify the insured as per the terms of the policy even when the accident was due to his own negligence.

5. In *Kaushnuma Begum's* case (*supra*), the Apex Court held that the jurisdiction of the Tribunal constituted under the Act is not restricted to decide claims arising out of negligence in the use of motor vehicles and that negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of use of the motor vehicles and that there also are other premises for such cause of action and even if there is no negligence on the part of the driver or owner of the motor vehicle, if the accident happens while the vehicle was in use, the owner should be made liable for damages to the person who suffered on account of such accident. It was held that "no fault liability" envisaged u/s 140 of the Act is distinguishable from the rule of strict liability and that in cases not covered by Section 140 of the Act, the victim or his legal representatives would be entitled to get compensation from the Tribunal only if none of the seven defences that are recognized in common law against action are available to the owner and that default on the part of the victim is one of the defences open to the owner.

6. In *Sitabai's* case (*supra*), the Matador went off the road and dashed against a tree resulting in death of its occupants. In that case the claimants could not produce any eye-witnesses. The driver who had knowledge as to how the vehicle

left the road and struck against a tree was not examined as a witness. So, an adverse was drawn against the driver and the Court by applying the theory of *res ipsa loquitur* awarded compensation to the claimants.

7. In A. Jagadeeswara Rao's case (*supra*), the Court held that an application for compensation by a driver, who himself was responsible for causing the accident is maintainable both under the provisions of the Act as well as the Workmen's Compensation Act, and that he is entitled to compensation only as per the provisions of the Workmen's Compensation Act, even if he makes a claim under the provisions of the Act.

8. In Prembai Patel's case (*supra*), the Apex Court held that if the driver of a vehicle dies in the course of employment and if the policy is taken by the owner only to cover the "Act Liability", without paying extra premium, the liability of the Insurance Company is limited to the liability under Workmen's Compensation Act only. In Para 6 of the said decision, it is clearly held that though an application for compensation can be made either under the Act or the Workmen's Compensation Act, if the claimants choose the forum provided under the Act, as the action is founded on the tort the injured or his legal representatives have to establish by preponderance of evidence that there was no negligence on the part of the injured or deceased and were not responsible for the accident and that the exception to that rule is in Section 140 of the Act, and if the claim is made under the provisions of the Workmen's Compensation Act, even if the workman died due to his own fault, the employer would be liable to compensation, but not so if the claim is made under the provisions of the Act.

9. Though in D. Satyanarayana's case (*supra*) and A. Jagadeeswara Rao's case (*supra*), relied on by the learned Counsel for the appellants, it was held that even if the accident occurred due to the negligence of the driver of the vehicle, his legal representatives would be entitled to the compensation under the provisions of the Act, in view of the ratio Prembai Patel's case (*supra*), Kaushnuma Begum's case (*supra*), those decisions should be taken to have been impliedly overruled, because in both the above cases the Apex Court clearly held that in a claim made under the provisions of the Act, compensation can be paid only when it is established by preponderance of evidence that there was no negligence on the part of the victim/ deceased at the time of the accident.

10. Sitabai's case (*supra*), is of no help for deciding this case because the averments FIR produced by the appellants show that the accident occurred due to the negligence of the deceased himself. Had the appellants filed a petition before the Commissioner under the provisions of the Workmen's Compensation Act, they would have been entitled to the compensation payable as per the provisions of that Act in spite of the fact that the death of the deceased occurred due to his own negligence. But when they chose the forum under the Act, unless it is established that the deceased was not negligent at the time of the accident, they cannot be granted compensation u/s 166 of the Act. They are entitled only to the compensation payable u/s 140 of the Act as observed in Kaushnuma

Begum's case (supra) and Prembai Patel's case (supra), if the deceased died due to his own negligence.

11. Since the appellants failed to adduce any evidence to show that the deceased was not negligent at the time of the accident and since the FIR produced by them shows that the accident took place due to the negligence of the deceased, it cannot but be held that the appellants failed to establish that deceased did not die due to his negligence. Therefore the appellants are not entitled to the compensation u/s 166 of the Act, they are entitled to compensation payable u/s 140 of the Act only.

12. The learned Counsel for appellant contended that the appellants may be given liberty to file an application under the Workmen's Compensation Act. Question of the claimants making a claim both under the provisions of the Act and Workmen's Compensation Act does not arise. They can chose either of the fora, but not both. When they chose the forum under the Act, they cannot again make a claim before the Commissioner. So, question of granting permission to the appellants to move the Commissioner under the Workmen's Compensation Act does not arise.

13. For the above reasons, I hold that the appellants are entitled to Rs. 50,000/- payable u/s 140 of the Act. The point is answered accordingly.

14. In the result, the appeal is allowed in part and an award is passed for Rs. 50,000/- in favour of the appellants against the respondents with interest at 9% per annum from the date of petition till the date of deposit into Court with proportionate costs before the Tribunal. Rest of the claim of the appellants is dismissed without costs. From out of the said amount, first appellant being the widow is entitled to Rs. 20,000/- and the interest thereon, third appellant, being the mother, and sixth appellant, being the son, of the deceased, are entitled to Rs. 15,000/- each and interest thereon. Second appellant being the father of the deceased need not be awarded any compensation because he is not a legal heir to the estate of the deceased and appellants 4 and 5 being the grand parents of the deceased and who cannot be said to be dependents on the deceased in the presence of second appellant who is bound to maintain them, are also not entitled to any compensation. Parties are directed to bear their own costs in this appeal.