**(1999) 06 AP CK 0028**

**In the Andhra Pradesh High Court**

**Case No :** AAO No''s. 46 and 65 of 1991

Oriental Insurance Co. Ltd., Warangal — APPELLANT

Vs

Kammidi Rajireddy and others — RESPONDENT

**Date of Decision :** 08-06-1999

**Acts Referred:**

Motor Vehicles Act, 1939 — Section 95(1), 95(2), 96

**Citation :** (2000) 2 ACC 412 : (1999) 4 ALD 251 : (1999) 4 ALT 274

**Hon'ble Judges :** Ghulam Mohammed, J

**Bench :** Single Bench

**Advocate :** Mr. M. Srinivasarao, for the Appellant; Mr. N. Krishmarao and Mr. K. Harinath, SC for APSRTC, for the Respondent

## Judgement

1. In both the CMA''s Insurance Company is the appellant. The CMA''s 46 and 65 of 91 arise out of OP No.229 of 88 and 227 of 88 respectively which were clubbed together and a common order was passed on 30-8-1990. In CMA No.46 of 88 the petitioner Kommireddi Rajireddy who sustained injuries claimed compensation of Rs.30,000/-, whereas CM A 65 of 91 which arose out of OP 227 of 88 filed by the wife of the petitioner in OP 229/88 claimed compensation of Rs.55,000/- on the ground that by virtue of the accident occurred on 11-4-1988 the child in the womb died. The brief facts of the case are as follows:

2. The claimant/petitioner in OP 227/ 88 was resident of Kamareddypalli village and on the date of accident she came to the bus stand of Kamareddypalli to go to Hanamakonda along with her husband Mr. Raji Reddy. The petitioner at that time was carrying nine months of pregnancy, at that time a Jeep bearing No.ATI 4275 going towards Hanamakonda agreed to give lift to both the petitioners/ claimants and some others and they boarded the said Jeep bearing No.ATI 4275 and unfortunately when the said jeep reached near to the agricultural farm at about 9.30 a.m. a bus bearing No.AAZ 8523 belonging to A.P.S.R.T.C. was coming in the opposite direction and the jeep hit against the R.T.C. bus. Due to the said accident the claimants/petitioners fell down and received injuries. Due to

the said injuries petitioner lost her un-born child. On 12-4-1988 the driver of the jeep died due to the injuries at M.G.M. Hospital, Warangal. The petitioners/ claimants were also admitted in the M.G.M. Hospital. The result of the accident was so grave that the child in the womb of the petitioner died and the same was removed by conducting an operation.

3. Respondent No.4 who is appellant herein in both the appeals had taken the defence that he is not aware of the accident and the said jeep which was involved in the accident was having an Act Policy and the said policy subsisting in the name of Respondent No.3 and stated that he is not liable to pay the compensation and the amount claimed is excessive. On the said pleading the Tribunal has settled two issues for consideration.

4. On issue No.1 the Tribunal found that the accident occurred due to the contributory negligence on the part of the jeep driver and Respondent No.5 i.e. driver of A.P.S.R.T.C. bus. After considering the evidence on record, particularly the evidence of PW1 and PW2, the Tribunal further found that the Jeep & Bus collided against each other and they sustained injuries and accident occurred due to the contributory negligence of both the drivers. There was no evidence adduced on behalf of Respondent No.4 with regard to the negligence aspect whereas Respondent No.5 the driver of the bus was examined as RW2, who stated that the accident occurred due to the negligence of the jeep driver and tried to absolve himself from the liability. The trial Court disbelieved the version of RW2 on the ground that he is not speaking truth about the accident and discarded his testimony on the ground of variation in the chief and cross examination. After accepting the oral evidence of PW1 and PW2 with regard to the accident and the contributory negligence of the drivers, the said finding in my view is just and proper. As far as the second issue with regard to quantum of compensation is concerned, the Tribunal relied upon the evidence of PW6 who is Medical Officer who examined the petitioner stated that the petitioner had sustained 3 injuries viz., Tenderness over the right clavical, contusion over the right upper part of the back and multiple abration and a lacerated would over the lower part of the back.

5. He further deposed that the petitioner was aborted because of those injuries. The Case-Sheet Ex.A2 shows that the abortion was due to the multiple injuries. The trial Court after considering the evidence of PW6 coupled with Ex.A2 found that the petitioner was aborted due to the said accident, the child died in the womb.

6. The Tribunal on appreciation of evidence awarded compensation towards medical aid and for taking rest after operation at Rs.8,000/- which is reasonable. An amount of Rs.3,000/- was awarded towards tranport and extra nourishment and a further sum of Rs.5000/- was awarded towards pain and suffering. The Tribunal did not grant any amount towards the death of the unborn child in the womb of the petitioner.

 

7. The only question that arises for consideration as to whether the liability of the Insurance Company to pay compensation in case of bodily injury to a gratuitous passengers. Learned Counsel for the appellant contended that the Insurance Company can not be made liable at all even to the extent of half which has to be borne by Respondents 1 to 4 jointly and severally. He further contended that as per Act Policy it does not cover and accordingly no liability rest on the part of Insurance Company and the Jeep in question was insured as private vehicle. To appreciate this contention, I have perused Ex.B1 Certificate of Insurance issued by Insurance Company it does not specifically exclude the gratuitous passengers. The other contention raised is since the jeep in question was transferred in favour of the driver the liability can not be imposed on the Insurance Company. To that extent, I can not agree with him, because there was no such plea taken in the counter and in the absence of any such pleading the trial Court has also not taken note of the said contention.

8. As far as Section 95 of the Motor Vehicles Act, 1939 Act 4/1939 (hereinafter referred as the Act) which deals with requirements of policies and limits of liability. Section 95(1)(b)(i) reads as under:

(b) insures the person or classes of persons specified in the policy of the extent specified in sub-section (2)

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place.

9. A full bench of Gauhati High Court in The New India Assurance Co. Ltd. Vs. Satyanath Hazarika and Others, , has considered the scope of Section 95 in respect of gratuitous passengers, particularly in view of the statutory instructions issued by Tariff Advisory Committee and held that in case of the gratuitous passengers the insurer is liable to indemnify or reimburse. It was also observed that even if there is no clause or covering the exclusion of gratuitous passengers the liability of the Insurance Company continues. In a judgment of Oriental Fire and General Insurance Company Ltd. v. Sanatan Pradhan, 1988 (2) TAC 43, wherein the learned Judges referred to the effect of the instructions of the Tariff Advisory Committee, a statutory body issued on 13-3-1978 requiring the Insurance Companies to mandatorily incorporate a clause in the Insurance contract reading ''death of or bodily injury to any person including occupants carried in the motor car provided that such occupants are not carried for hire or reward''.

10. In a judgment in Assam Corporation v. Binu Rani, AIR 1975 Gauhati 3, a view was however taken by a Division Bench that the word ''third party'' finding place in Section 95(1)(b)(i) of the Act, would include a gratuitous passenger in a jeep. In coming to the aforesaid conclusion, definition of the expression ''third party risk'' given in Stroud''s judicial Dictionary, 3rd edition Volume 4 Pages 3019-3020 and what was stated in Digby v. General Accident, 1943 AC 121,

 

were taken note of. Being of this view the entire amount awarded to the claimant was ordered to be paid by the insurer. In this connection a reference was also made to Sagar Chand v. Santosh Gupta, 1985 ACC CJ 585 - Delhi, and also of the Orissa High Court judgment was referred, the accident had taken place in 1982 after the aforesaid instruction the learned Chief Justice who spoke for the Court observed as we have no difficulty in holding that the insurer was liable for the injuries sustained by gratuitous passenger of a private insured vehicle by observing that by fiction of law the wider liability will be deemed to have been included in the insurance cover.

11. In a recent judgment rendered by the Apex Court in Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others, , it was held that persons travelling in a car sustained injuries and the car collided with goods carrier and also considering the expression ''any person'' it was held that the liability of the Insurance Company subsists by interpreting the expression ''any person'' to be included occupant of car who is gratuitously traveling in a car. Whereby the judgment in Madras Motor and General Insurance Co. Ltd. v. Katavreddi Subbareddy 1975 ACJ 95 (AP) , was affirmed and the judgment in Pushpabai Purshottam v. Ranjit Ginning & Pressing Co. 1977 ACJ 343 (SC) was distinguished. With regard to the clause under the heading ''Avoidance of certain terms and right of recovery'' which reads thus: "Nothing in this policy or any endorsement here upon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96. But the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions". It was further held that the Insurance Company is also liable to meet the claim of the claimant and satisfy the award passed by the Tribunal to the extent of liability fixed by the Tribunal. In the present case in Ex.B1 i.e. Certificate of Insurance, there is an identical clause under the heading of ''Avoidance of certain terms and right of recovery''.

12. The Apex Court in B.V. Nagaraju Vs. M/s. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, , while considering the alleged breach of carrying humans in a goods vehicle more than the number permitted in terms of insurance policy, it was held that ''Is not so fundamental a breach so as to afford to the insurer to eschew liability altogether, exclusion term of insurance policy read down to serve main purpose of the Act. In the said judgment a reference was made to Skandia''s case AIR 1987 SC 1184 wherein the Apex Court has paved the way towards reading down the contractual clause by observing:

"When the option is between opting for a view which will relive the distress and misery of the victims or accidents or their dependants on the one hand, and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinnaire approach, the very same conclusion would emerge in obeisance to the doctrine of ''reading down'' the exclusion clause in the light of the ''main purpose'' of the provision so that the ''exclusion clause'' highlighted earlier. The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose. The theory which needs no support is supported by Carper''s breach of contract."

13. Accordingly, the Apex Court observed that even in case of exclusion term of insurance policy must be read down so as to serve the main purpose of the policy that is indemnify the damage caused to the vehicle.

14. In the instant case there is no specific exclusion of the policy so as to exclude such an eventuality and particularly the grauitous passengers who sustained injuries, the liability of the Insurance Company subsists and continues. The Tribunal has passed the award only to the extent of making the respondents 1 to 4 including insurance company (Respondent No.4) to bear the responsibility of half of the compensation jointly and severally and remaining half to be borne by the Respondent No.5 i.e. A.P.S.R.T.C.

15. In view of the above legal position, I do not find any infirmity in the finding arrived at by the Tribunal. The only dispute raised by the appellant is with regard to the liability imposed upon it even to the extent of half jointly and severally by respondents 1 to 4. Accordingly, I confirm the award of the Tribunal and dismiss the CMA No.46 of 1991.

16. Coming to CMA No.65 of 1991 which was preferred by the Insurance Company against OP 227 of 88 the Insurance Company (respondent No.4) did not dispute the quantum of compensation awarded to the petitioner but it is contended that the liability imposed ought not have been imposed on respondent No.4. The view which 1 have taken in CMA No.46 of 1991 will govern in this case also.

17. Accordingly, both the CMA''s are dismissed. No costs.

 