(2014) 04 AP CK 0170

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No. 414 of 2007

The Oriental Insurance Company Limited — APPELLANT

Vs

Vempalli Khasim Bee — RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 146, 147, 147(1), 166

Citation : (2015) 1 AnWR 186

Hon'ble Judges : Dr. B. Siva Sankara Rao, J

Bench : Single Bench

Advocate : S.A. Vratnam, Advocate for the Appellant; V. Bhaskara Reddy, Advocate for the Respondent

Judgement

Dr. B. Siva Sankara Rao, J.—The second respondent-insurer, among the two respondents including owner of the Lorry bearing No. AP 16 W 755 covered by Ex. B.1 policy of the claim petition; aggrieved by the award of the Tribunal dated 18-9-2006 in O.P. No. 649/2004 filed under Section 166 of the Motor Vehicles Act, 1988 (for short "the Act") by wife, two minor children and parents (five in number) of the deceased (of whom 5th claimant died pending the appeal and his L.Rs. on record) of late Abdul Rasool, who was succumbed to injuries in the accident dated 3-4-2002 for compensation of Rs. 3,00,000/-, that was since awarded by the Tribunal by fixing joint and several liability with interest at 7.5 % p.a.; preferred the appeal.

2. The appeal preferred is basing on the grounds that, award of Tribunal is contrary to law, Tribunal went wrong in non-consideration of the factum of the lorry was with cement load and the deceased was a person among others who boarded the loaded lorry in mid-way as unauthorized passengers and there is nothing to show that vehicle was engaged by the deceased for the so called 20 tomato baskets, there is no proof of any freight charges paid except the oral say, thereby, to hold the deceased as unauthorized passenger of goods vehicle, that the policy not covered the risk, thereby, the insurer is not liable, hence to allow

the appeal by exonerating the insurer. The learned counsel reiterated the same by referring to the settled position of law and distinction between unauthorized passenger and owners of goods/an attendant of goods.

3. Whereas it is the contention of the learned counsel for the claimants that the deceased as per the evidence of one of the persons travelling at the time of accident in the lorry, by name, V. Ramanjaneyulu (P.W.2) boarded the lorry at Jammalamadugu along with 20 tomato baskets, once such is the case, he is the owner of the goods and the owner of the goods is entitled to compensation even from the Act policy, under section 146 read with 147 of the Act and also placed reliance upon the following proposition viz., Sanjeev Gupta and Others Vs. Ram Pal and Others, , wherein it was held that several small shop keepers were travelling in the truck along with their goods, truck met with accident, passengers received injuries and a few succumbed, these persons were passengers travelling along with their goods, make the insurance company liable. For the conclusion, the High Court of Judicature at Allahabad, Lucknow Bench (single Judge) referring the expression of the Apex Court in Ramesh Kumar Vs. National Insurance Co. Ltd. and Others, wherein at para 7 and 8 it was held that the insurance company, under section 147(1) of the Act, is liable for the death or bodily injury for owner of the goods or for representative travelling in the goods vehicle. The other decision placed reliance is Oriental Insurance Company Limited Vs. Yarava Lakshmi Devi and Others, , wherein it was held that owner of the goods travelling in a goods vehicle met with accident which resulted to death, the insurance company under section 147 is liable for the third party risk and the contention contra by the insurance company of the Act policy not covered is held untenable. Contra to it, the decision placed reliance by the insurer is National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, wherein it was held that under section 147(1) of the Act, insurance company is not liable for passengers travelling in a goods vehicle but for the passenger, is owner of the goods by sitting in the cabin.

4. Perused the material on record. Parties being referred as arrayed before the Tribunal.

5. Now the points that arise for consideration are:

"1) Whether the award of the Tribunal fixing joint liability holding the deceased as owner of goods, impugned by the insurer is unsustainable; the deceased is a mid way unauthorized passenger or owner of goods; the death is result of his travelling as unauthorized passenger or otherwise and if so, what compensation? If any the claimants are entitled, against which of the respondents?

2) To what result?"

POINT NO. 1:

6. The undisputed facts'' are that the accident took place on 3-4-2002 at 3.00 P.M. due to rash and sheer negligence of driver of the lorry from its controlling,

having it been turned turtle and the lorry was with cement load and the deceased herein and another person was succumbed to injuries, after fall of cement bags from the lorry on them. As per Ex.A.3 FIR, relied upon by the claimants, which was also placed reliance on by the insurer/ second respondent to the claim and the appellant herein, it speaks that the lorry is set in motion by one of the persons travelling in the lorry by name, Poojari Bala Venkatesh, he was cited as L.W.1 in the charge sheet by referring him as one of the persons travelling in the lorry, another person L.W.2 in the charge sheet examined as P.W.2- Vallapu Ramanjaneyulu. The FIR (Ex.A. 3) shows the report was given within half an hour after the accident, with fresh in facts from the police station within 3 P.M. that it reads that he is a resident of Simhadripuram and live by cultivation, on that day in the morning himself and P.W.2 together went on some work in Jammalamadugu and after completed the work, it was at about 12.00 noon at Jammalamadugu and both were waiting on road side for catching a bus to travel, they stopped a lorry proceedings towards Mudanoor, boarded the lorry, besides them there are four more persons boarded the lorry there, it is also stated that all the six passengers are there in the lorry at the time of accident, that resulted due to the rash and negligent driving of the driver of the said lorry, lorry lost control and the front wheel base broken resulting the lorry turned turtle and they fell down, among the six persons two of them were fallen down, cements bags fallen on them and they succumbed there from. There is no whisper in the FIR that the deceased was travelling along with any luggage or goods much less 20 baskets of tomatoes. The Apex Court in National Insurance Co. Ltd. Vs. Savitri Devi and Others, held that the question as to whether the burden of proof has been discharged by the party to the lis, or not, would depend upon the facts and circumstances of the case. The FIR is alone may or may not be taken into consideration, but when the FIR facts itself made part of the claim, there cannot be any doubt whatever that the same can be the basis for the foresaid purpose. It is there very clear that the FIR made part of the claim and placed reliance by the claimants when disclosing upon the facts that the deceased was midway unauthorized passenger in vehicle and in a clinch and clear terms that too by another passenger who said to have made complaint within half an hour after the accident. It cannot be contended thereby that the deceased was travelling with 20 baskets of tomato. When such is the case, the observations of the Tribunal at para 16 to 19, that the second respondent-insurer did not adduce any independent evidence even P.W.2 one of the passengers deposed that the deceased boarded the lorry with 20 baskets of tomato, to claim as owner of goods is, untenable undisputed. It is also important to note that scene of observation report is not even filed, to say, the mention if at all existence of any tomato baskets at the scene if in the lorry to find place to consider even the complainant inadvertently not mentioned. The charge sheet also no way speaks any existence of tomato baskets besides cement bags even to give any credence to the evidence of P.W.2, for the first time at the witness box deposed as if the deceased was travelling with 20 bags of tomato. There is a clear and categorical suggestion put to him in the cross examination by the insurer that the deceased was one of the unauthorized passengers and not travelling with so called 20 baskets of tomato. R.W. 1 employ of the insurer, though not a witness of the occurrence, reiterated the said factum of accident and the deceased was also one of unauthorized passengers, which the Ex.A.3 FIR contents disclose supra. Having regard to the above, it is clear that the tribunal went wrong in giving utmost credence to the said version of P.W.2, by ignoring even the said version is a lie from the above factual background. Even taken for arguments sake of the deceased was travelling with so called baskets, he could not be regarded as owner of goods, more particularly, from factum that there is only one person whose goods engaged in the vehicle can travel as owner or attender of goods i.e. relating to cement as admittedly, even from the charge sheet, F.I.R. and evidence on record, the lorry is with cement load. It makes no difference as to whether the cement load is half or a full load or 3/4th load. It is not even produced the trip sheet much less summoned to show that the trip sheet mentioned about any tomato baskets carrying as goods even from the mid way. The driver not even much less owner came to the witness box. From the recitals of FIR it came to establish that the deceased was not travelling with tomato baskets. When there is no dispute on the proposition, placed reliance by the claimants, that of the single judge of the High Court of Judicature at Allahabad, Lucknow Bench, supra) in saying owner of the goods is covered by statutory policy in the insured to-indemnifying as third party. The very decision speak in consideration whether policy covers the risk or not in so saying that the other than owner of goods is to be recorded as unauthorized passenger. From the Allahabad High Court even stated in Sanjeev Gupta Supra, very close reading speaks that several small shop keepers along with their respective goods engaged the lorry and while they were travelling, one of them succumbed to death and they made a claim for regarding the deceased as owner of the goods it could be; but here the facts are entirely different as it is not even the case of the claimants that they engaged the lorry much less with others including the persons to whom cement load belongs commonly. In fact particularly from the factum that FIR and P.W.2 evidence speak the deceased boarded the lorry only at Jammalamadugu and already there is existing load of cement, as such, even from the so called evidence of P.W.2 and with reference to the said expression of Sanjeev Gupta 2011 ACJ 2397 supra, the claimants cannot claim that the deceased was owner of the goods. Thereby, the contention of the claimants that the Tribunal is right in holding that deceased was owner of the goods, is untenable. The deceased is rightly contended by the insurer as held by the Apex Court in National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, referred supra, only an unauthorized passenger, even non gratuitous.

7. However, the fact remains that from the very FIR placed reliance on both sides the deceased not succumbed due to fall from the lorry due to the negligence of the driver of the vehicle, but thereafter only, after the lorry turned turtle and the load of cement bags fallen on the deceased and another person. Once the deceased even travelling as unauthorized passenger along with another person,

who were fallen from the vehicle when the vehicle turned turtle, but however, the moment they fell down, they are third parties. If the accident occurred there from, the insured is liable under section 147 of the Act as per the expressions discussed in the supra, to make liable for compensation. Here the categorical facts proved from the material on record, it is not the case, on fall of the deceased from the vehicle sustained injuries and succumbed to, but from the lorry turned turtle in the accident and the cement load bags fall on the deceased and due to that he was succumbed. Having regard to the above, it is also corroborated from Ex.A.2 PME report contents. Thus, the insurer to the extent liable to the death of deceased as a third party to pay compensation. Here there is a composite negligence on the part of the deceased also in travelling in a goods vehicle as unauthorized passenger as but for that the accidental death of him might not occurred, to say, his contribution is also there. Once it is the case, it is just to fix 50% contribution on the part of the deceased and the driver in travelling and allowing as unauthorized passenger and for remaining 50% negligence the insurer and insured with driver also as death is while as third party after the lorry turned turtle and he was fallen down, these from the cement bags load with which the lorry was travelling, the bags fallen on the deceased and he was succumbed therefrom. It is because, had the lorry not turned turtle and the bags not fallen down, the deceased could be saved or not be treated as unauthorized passenger and it is just to fix 25 % negligence on the part of the deceased and 25% negligence on the part of the owner and driver so far as the deceased as unauthorized passenger in travelling. Death was the result after the fall of the deceased, from that stage, he was a third party. The same is clearly supported from the expressions viz., A. Subramani Vs. Mani and Others, , Thoznilalar Transport Company Vs. Valliammal and Others, , Kanwar Shamsher Singh and Others Vs. Satbir Singh and Others, , Oriental Insurance Co. Ltd. and Another Vs. Edward D''Cruz and Others, , wherein though the facts are in different context, held even a passenger of the vehicle traveled for a particular destination, he was only passenger till the destination and the moment the destination reached, he is ceased to be the passenger and from that moment, he is a third party. This court also by referring to and placing reliance on the above expressions in United India Insurance Company Limited Vs. Kurva Yejju Mallamma and Others, held that when the accident occurred after the deceased virtually get down from the vehicle, subsequently, he is a third party and not a gratuitous passenger and the insurer is liable to that extent.

From the above, 50% liability is of the insurer and owner and additional 25% liability is of the owner and driver personally and 25% negligence remaining is of the deceased.

8. Coming to the quantum, the accident was dated 3-4-2002, the deceased was aged about 35 years, the claim is under section 166 of M.V. Act and as per Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , for a person aged 36 to 40 years, the multiplier is 15 and upto the age of 35 years, is 16. The Tribunal taken multiplier 16, which no way requires interference as the

age is clearly stated of 35 if not even more. The claimants are five in number all dependants on the deceased, but for one died pending the appeal. Even taken the personal expenditure deduction of 1/4 as per the Sarla Verma for more than three dependants; coming to the earnings of the deceased for no proof of Rs. 5,000/- per month earnings, as per the expression of the Apex Court in Lata Wadhwa and Others Vs. State of Bihar and Others, , at Rs. 3,000/- per month the minimum to be taken and in the present case the accident was dated 3-4-2002, it is thus just to take at Rs. 3,100/- per month and if l/4th deduced towards personal expenses, it comes to Rs. 2,325/- per month x 12 x 16 = Rs. 4;46,400/- plus loss of consortium to the first claimant Rs. 1,00,000/-, funeral expenses Rs. 25,000/- and loss of estate Rs. 5,000/-, care and guidance to two minor children Rs. 10,000/- each, (vide decision Rajesh and Others Vs. Rajbir Singh and Others, it comes to Rs. 5,96,400/- and 50% there in towards joint liability of the insured and the insurer, it comes to Rs. 2,98,200/-. Thus, out of the claim of Rs. 3,00,000/-, the insurer is liable to indemnify the insured for Rs. 2,98,200/- and the remaining amount of Rs. 1,800/- is the personal liability to pay by the owner. Accordingly, the point I is answered.

POINT No. 2

In the result, appeal is partly allowed by reducing the liability of insurer to compensation by indemnifying the insured to Rs. 2,98,200/- with interest at 7.5% P.A. out of Rs. 3,00,000/- as the remaining Rs. 1800/- with interest at 7.5% P.A. is that of the insured/owner of the vehicle. In other respects, the award of the tribunal on apportionment etc., holds good. There is no order as to costs.

The miscellaneous petitions pending, if any, in this appeal shall stand closed.

