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(2006) 10 AP CK 0083

In the Andhra Pradesh High Court

Case No : Civil Miscellaneous Appeal No. 9 of 1999

The Tirumala Tirupati Devasthanams APPELLANT

Vs

N. Baby and Others RESPONDENT

Date of Decision : 19-10-2006

Acts Referred:
Motor Vehicles Act, 1988 — Section 2(24)

Citation : (2006) 10 AP CK 0083

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

Bench : Single Bench

Advocate : M. Adinarayana Raju, for the Appellant; M. Dorai Raj and A.V.K.S. Prasad, for the Respondent

Judgement

C.Y. Somayajulu, J.—Respondents 1 to 3, who are the widow and children of N. Lakshmaiah (deceased) filed a claim petition under the Motor Vehicles Act, 1988 (for short ''the Act'') seeking compensation of Rs. 5,00,000/- from the appellant and the 4th respondent alleging that the deceased who was aged 30 years earning Rs. 3000/- p.m. died due to the rash and negligent driving of the driver of the vehicle belonging to the appellant when he was sleeping near a cattle Farm at Chandragiri Road, Tirupathi on 17-04-1994 at about 5.00 a.m.

2. Appellant filed its counter putting the respondents 1 to 3 to proof of the averments in the petition and alleged that after full pledged enquiry, it came to know that there was no fault on the driver of its vehicle.

3. Fourth respondent filed its counter putting the respondents 1 to 3 to proof of the allegations in the claim petition and their relationship with the deceased and admitting insurance of the offending vehicle with it by the date of the accident, and alleging that the quantum of compensation claimed under various heads is highly excessive and exorbitant.

4. In support of their claim, respondents 1 to 3 examined two witnesses as P.Ws. 1 and 2 and marked Exs.A1 to A5. In support of its case, the appellant examined

the driver of the offending vehicle as R.W.1, but did not adduce any documentary evidence on its behalf. No oral evidence was adduced by the fourth respondent, but Ex.B1 was marked on its behalf by consent. The Tribunal held that the accident occurred due to the rash and negligent driving of the driver of the vehicle belonging to the appellant, i.e. R.W.1 and awarded Rs. 4,32,858/- as compensation to respondents 1 to 3 against the appellant only and exonerated the 4th respondent from liability on the ground that the accident did not occur in a public place. Hence this appeal by the owner of the vehicle involved in the accident.

5. Since the finding of the Tribunal that the accident took place due to the rash and negligent driving of R.W.1 is not seriously challenged and since the learned Counsel for the appellant confined his argument only to the liability of the 4th respondent and the quantum of compensation, the points that arise for consideration in this appeal are:

1. To what compensation are respondents 1 to 3 entitled to?

2. Whether the second respondent is not liable to pay the compensation payable to respondents 1 to 3?

6. Point No. 1: The evidence of the first respondent as P.W.1 is that the deceased was aged about 30 years and was working as a cowherd in the S.V. Dairy Form of the appellant on a monthly salary of Rs. 2,797.60 ps as per Ex.A1. During cross-examination, she stated that her parents-in-law are not alive and that the deceased has brothers and sisters but they are not dependants on the deceased. Ex.A1-salary certificate produced by respondents 1 to 3 relating to the deceased is not denied or disputed by the appellant. It shows that the total earnings of the deceased per month was Rs. 2,797.60ps and his take home salary was Rs. 1,980.50ps after deductions of Rs. 817.10ps, which include Employees Welfare Fund, General Insurance, L.I.C., Profession Tax, G.P.F. Contribution and the amount due to bank from the deceased. Since the contribution of the deceased for the maintenance of respondents 1 to 3 can only be from out of his take home salary, and as the savings made by him towards provident fund etc., would only benefit his estate, and since the take home salary of the deceased was only Rs. 1,980/-, deducting 1/3rd there from, his contribution to the respondents 1 to 3 could only be Rs. 1,350/- p.m. Since the deceased would have earned increments in his future, his average monthly contribution to respondents 1 to 3 can be taken as Rs. 1400/-. Since the deceased was aged about 30 years at the time of his death, and since the accident took place prior to the 1994 amendment to the Act the multiplier as per Bhagwandas Vs. Mohd. Arif, would be 17. So the pecuniary damages payable to the respondents 1 to 3 would be Rs. 1400 X 17 = Rs. 2,85,600/-. First respondent, as widow of the deceased, is entitled to loss of consortium of Rs. 15,000/-. In Y. Varalakshmi and Others Vs. M. Nageswara Rao and Others, it is held that in every fatal accident case, a minimum amount of Rs. 15,000/- has to be awarded towards non pecuniary damages. Keeping in view the age and earnings of the deceased the non

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pecuniary damages payable to the appellant can be fixed at Rs. 50,000/-.

7. So, respondents 1 to 3 would be entitled to Rs. 2,85,600/- + Rs. 15,000/- + Rs. 50,000/- = Rs. 3,50,600/- as compensation for the death of the deceased. The point is answered accordingly.

8. Point No. 2: The contention of the learned Counsel for the appellant is that since 4th respondent did not take a specific plea in the counter that inasmuch as the accident did not occur in a public place it is not liable to indemnify the appellant and since there is no reliable evidence on record to show that the accident did not occur in a public place, and since the question whether the accident occurred in a public place or not is a pure question of fact, which has to be decided on the evidence to be adduced by the parties and since no amount of evidence can be looked into on a plea which is not taken, when there is no reliable evidence on record, in that regard, the Tribunal was in error in holding that the accident occurred in a private premises but not a public place. It is his contention that the Tribunal erred in relying on the answer given by R.W.1 during cross-examination that the place where the dead body of the deceased was found is the premises of the appellant and not on the road and that Dairy Farm Workers of the appellant alone would be allowed into the Dairy campus which is not a public place, the Tribunal erroneously held that the accident took place in a private place and contended that since RW1, who is a driver, might not know the legal parlance and what place is a ''private place'' and what place is a ''public place'' as per the Act and since places under lock and key of the owner can be considered as ''public places'' in certain circumstances the finding of the Tribunal in that regard is not sustainable by relying on the ratio in the full Bench of Bombay High Court in Pandurang Chimaji Agale and another Vs. New India Life Insurance Co. Ltd. and others, which is followed by a learned Judge of this Court in P. Muse Khan and Others Vs. M. Gopala Krishnaiah and Another, . He also relied on New India Assurance Co., Ltd., Nirmal v. Are Poshanna @ Posalu and Ors. 2005(2) ALD 100 and also on Bondar Singh and Others Vs. Nihal Singh and Others, where it is held that in the absence of a plea in the written statement or an issue, no evidence in that regard can be looked into. The contention of the learned 4th respondent is that since RW1 clearly admitted in his cross-examination that the place where the dead body of the deceased was found is a premises of the appellant and not a road and that only vehicles belonging to the appellant, and the workers of the Dairy Farm alone would be allowed into the dairy campus and that is not a public place, and that the main road is at a distance of 1/2 furlong of the place where the dead body was found, it is easy to see that the place where the accident took place is a private place but not a public place and since the question whether the scene of accident is a public place or private place is a pure question of law, and since there is evidence on record to show that the place of accident is a private place, the Tribunal rightly held that 4th respondent (the insurer) is not liable to pay the compensation payable to the claimants. He placed strong reliance on Life Insurance Corporation of India Vs. Karthyani and Others, and Nagarathinam Vs. Murugesan and Others,

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in support of his contention that when an accident takes place in a private place the insurer cannot be made liable.

9. When insurance is admitted, the burden to establish that it is not liable to answer the claim is on the insurer. It has to plead and prove the grounds on which it is claiming exemption so that the other party can have an opportunity to know its case and meet that case. 4th respondent did not take a plea in its counter that it cannot be made liable for compensation inasmuch as the accident occurred in a private place. As rightly contended by the learned Counsel for the appellant question whether the accident took place is a private place or public place is a question of fact but not a question of law, as assumed by the Tribunal. In Pandurang Chimaji Agale and another Vs. New India Life Insurance Co. Ltd. and others, , P. Muse Khan and Others Vs. M. Gopala Krishnaiah and Another, and Are Poshanna Case 2005(2) ALD 100 (supra) Courts held that the word ''public place'' in Section 2(24) of the Act refers even to a place which is not a part of thorough fare as the definition given to ''public place'' in the Act is an inclusive definition, and that a place, in order to be a public place, is one to which the public ''have a right of access''. Therefore it is clear that the question whether a place is a ''public place'' or a private place'' depends on the ''access'' to it by the public. In Pandurang Chimaji Agale and another Vs. New India Life Insurance Co. Ltd. and others, the accident took place within the compound of Tata Engineering and Locomotive Company Limited exclusively belonging to the said company. Even then, in the facts and circumstances of that case, it was held that the place of accident is ''public place'' for the purpose of the Act. So it is clear that the question whether the place of accident is a ''public place'' or a ''private place'' is a pure question of fact. Had the 4th respondent taken a plea that it is not liable to indemnify the appellant, as the accident involving the deceased took place in a ''private place'', the appellant would have had an opportunity to adduce evidence to establish that the place of accident is a public place or not. Without taking a specific plea with regard to its non liability for the grounds stated the insurer cannot spring a surprise on the insured, by taking advantage of the some of the answers elicited during cross-examination of witnesses on aspects which are not covered by the pleadings or issues. Since 4th respondent did not take a specific plea in the counter that the place of accident is a private place, it cannot, by taking advantage of the answer given by R.W.1, (driver), escape its liability, that too when Ex.A2-FIR is ambiguous in the sense it mentions the place of accident as As rightly contended by the learned Counsel for the appellant R.W.1 cannot be expected to know whether the scene of accident is a ''public place'' or not within the meaning of the Act. So 4th respondent only by taking shelter under the answer given by R.W.1 in the cross-examination escape its liability, because in certain circumstances even a private place also can be treated as a public place for the purpose of the Act. Since a learned Judge of this Court in P. Muse Khan and Others Vs. M. Gopala Krishnaiah and Another, followed the view taken by the Full bench of the Bombay High Court in Pandurang Chimaji Agale and another Vs. New India Life Insurance Co. Ltd.

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and others, I also preferred to follow the view taken in P. Muse Khan and Others Vs. M. Gopala Krishnaiah and Another, . Therefore, I am not in agreement with the view taken in Life Insurance Corporation of India Vs. Karthyani and Others, and Nagarathinam Vs. Murugesan and Others, more because, there is no plea or issue on the question whether the accident took place in a ''private place'' or a ''public place''.

10. In view of the above, I hold that 4th respondent also liable to pay the compensation payable to respondents 1 to 3. The point is answered accordingly.

11. In the result, the appeal is allowed in part and an award is passed for Rs. 3,50,600/- in favour of respondents 1 to 3 against the appellant and 4th respondent jointly and severally with interest at 9% p.a. from the date of petition till the date of deposit into the court with proportionate costs in the Tribunal. Rest of their claim is dismissed without costs. From out of the said amount, respondents 2 and 3 are each entitled to Rs. 1,11,860/- and interest thereon and 1st respondent is entitled to rest of the amount i.e. Rs. 1,22,880/- and interest thereon. Parties are directed to bear their own costs in this appeal.

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