
(2009) 07 AP CK 0021

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. No. 858 of 2009

United India Insurance Co. Ltd.

APPELLANT

Vs

Kankanti Sathaiah and others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 163

Penal Code, 1860 (IPC) — Section 338

Workmens Compensation Act, 1923 — Section 140(4), 166

Citation : (2011) ACJ 787

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : V. Sambasiva Rao, for the Appellant; U.P. Rao, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayanan, J.—M.A.C.M.A.M.P. No. 3545 of 2009 is filed by petitioners-respondent Nos. 1 and 2 to vacate the interim stay granted by this court in the M.A.C.M.A.M.P. No. 1507 of 2009. When the vacate application came up for hearing before this court, the counsel on record Mr. V. Sambasiva Rao and Mr. U.P. Rao, made a request for disposal of the M.A.C.M.A. itself finally. Hence, the same was heard finally by this court with the consent of the counsel on record.

2. Mr. V. Sambasiva Rao, the learned counsel for the appellant-respondent No. 2 in O.P. No. 2205 of 2007 on the file of XXII Additional Chief Judge-cum-Motor Accidents Claims Tribunal, City Criminal Court at Hyderabad (hereinafter referred to as "the Tribunal below") would maintain that the judgment and decree made by the Tribunal below cannot be sustained. The learned counsel pointed out that the compensation awarded by the Tribunal below is excessive. The learned counsel also pointed out to the oral and documentary evidence available on record and would maintain that at the relevant point of time, they being minors and inasmuch as there was contributory negligence on the part of the deceased also, the awarding of compensation at the best can be 50 per cent and the rest

of the 50 per cent awarded by the Tribunal below to be negated. The learned counsel placed strong reliance on *Anuradha Kaushik and Others Vs. Varun Ground Water Development Corporation and Others*,

3. Per contra, Mr. U.P. Rao, the learned counsel representing the contesting respondents-claimants had taken this court through the reasons which were recorded by the Tribunal below and would maintain that in the light of the convincing reasons recorded by the Tribunal below, this is not a fit matter to be interfered with. The learned counsel also further pointed out that except marking certified copy of the insurance policy as Exh. B1, no other acceptable evidence worth mentioning had been placed before the court. Hence, in the absence of any evidence whatsoever in this regard, it cannot be contended that the deceased were minors at that time and further it cannot be contended that there was contributory negligence and hence, the compensation to be restricted to 50 per cent of the awarded compensation. The learned counsel relied on several decisions to substantiate his submissions.

4. Heard the counsel. Perused the oral and documentary evidence available on record and also the findings recorded by the Tribunal below.

5. In the light of the submissions made by the learned counsel on record, the following points arise for consideration in this M.A.C.M.A.:

(1) Whether the findings recorded by the Tribunal below on appreciation of oral and documentary evidence to be confirmed or to be disturbed in the facts and circumstances of the case?

(2) If so, what relief the parties would be entitled to?

Point No. 1:

6. The parties hereinafter would be referred to as shown in O.P. No. 2205 of 2007 on the file of the Tribunal below. The said O.P. was filed by the respondent Nos. 1 and 2 as claimants u/s 163-A of the Motor Vehicles Act (in short, hereinafter referred to as "the Act" for the purpose of convenience) claiming compensation of Rs. 5,00,000 for the death of one K. Mahipal in a motor vehicle accident. The Tribunal below on appreciation of evidence of PWs 1 and 2 and also Exh. A1 to Exh. A7 and Exh. B1, came to the conclusion that the said O.P. to be allowed partly with proportionate costs against both the respondents awarding compensation of Rs. 3,99,000 with future interest at 9 per cent per annum from the date of filing of the claim petition till the date of realization. Aggrieved by the same, the present M.A.C.M.A. had been preferred by United India Insurance Co. Ltd., respondent No. 2. The respondent No. 1 in the O.P. is shown as respondent No. 3 in the present M.A.C.M.A. For the purpose of convenience the parties hereinafter would be referred to as shown in O.P. No. 2205 of 2007 on the file of the Tribunal below.

7. It was averred in the O.P. that the petitioners are the parents of the deceased K. Mahipal. On 20.12.2007 the deceased along with his friend T. Narasimhulu

went on his scooter bearing No. AP 2-E 1923 to Aziznagar for marriage. While they were returning from the marriage, when they reached Erilapally Gate and they dashed against one DCM van bearing No. AP 28-X 661 which was parked negligently in the middle of the road without any parking lights and also failed to take minimum precautions. The petitioners stated that the accident occurred due to negligence of the driver of DCM van bearing No. AP 28-X 661. Due to the accident, the deceased died on the spot and T. Narasimhulu sustained grievous injuries. Scooter is completely damaged. The petitioners further stated that if the driver of DCM van had taken precaution of keeping parking lights on, the accident might have not happened. Further, there are no lights on the road and it was completely dark. Police, Shankerpally registered a case in Cr. No. 198 of 2007 against the driver of DCM van. The petitioners stated that the deceased was doing real estate business as Field Officer and earning Rs. 5,000 per month and contributing the same for the welfare of the parents. Petitioners are dependent on the earnings of the deceased. Respondent No. 1 is the owner and respondent No. 2 is the insurance company are jointly liable to pay compensation to the petitioners.

8. The respondent No. 1 filed counter stating that the petitioners to prove the manner of accident, age, income of the deceased and further had taken a stand that the respondent No. 1 was not liable to pay any compensation as the deceased was not having driving licence at the time of the accident and further stated that the insurance company, respondent No. 2 alone is liable to pay compensation.

9. The present appellant-respondent No. 2 filed counter to the effect that the petitioners to prove the manner of accident, age and income of the deceased and further stated that there was no negligence on the part of the driver of DCM van bearing No. AP 28-X 661 and denied that the deceased was not doing the work as Field Officer in Saphthagiri Real Estate and was not earning Rs. 5,000 per month and hence, the respondent No. 2 is not liable to pay any compensation whatsoever.

10. On the strength of these pleadings, the following issues were settled:

(1) Whether the accident took place on 20.12.2007 at about 9 p.m., due to the rash and negligent driving of DCM van bearing No. AP 28-X 661 by its driver?

(2) Whether the petitioners are entitled to compensation? If so, to what amount and from whom?

(3) To what relief?

11. On behalf of petitioners-claimants, PWs 1 and 2 were examined, Exh. A1 to Exh. A7 were marked. On behalf of the respondent No. 1 no evidence had been adduced. On behalf of the respondent No. 2, i.e., the present appellant, Exh. B1 was marked with consent and no oral evidence had been adduced.

12. The mother of the deceased, PW 1, stated how her son died in the accident

while going on the scooter. PW 1 is not an eyewitness to the accident but, however, Exh. A1, certified copy of the F.I.R. and certified copy of the charge-sheet, Exh. A2 were marked. However, to prove the manner in which the accident occurred, an eyewitness, PW 2, was examined. who deposed that he saw two persons were going in front of his auto on the scooter and they dashed against DCM van which was parked in the middle of the road. The evidence of PWs 1 and 2 was appreciated in detail and findings had been recorded. Exh. A4 is the certified copy of the PME report, Exh. A5 is the certified copy of the MVI report, Exh. A6 is the certified copy of scene of offence panchnama and Exh. A7 is the certified copy of the rough sketch. It is needless to say that Exh. B1 is the certified copy of insurance policy. Though stand had been taken that the deceased being a Field Officer in Sapthagiri Real Estate was earning Rs. 5,000 per month and his age was about 19 years, the income of the deceased was taken as Rs. 3,000 per month and since the deceased died as bachelor, the age of the mother had been taken into consideration and multiplier "16" was applied and thus, the loss of income was arrived at Rs. 3,84,000. Further, the claimants were awarded an amount of Rs. 10,000 for loss to estate and Rs. 5,000 for funeral and other expenses. Thus, a quantum of Rs. 3,99,000 had been awarded with future interest at 9 per cent per annum from the date of filing of the petition till the date of realization with certain further directions. Strong reliance was placed on the decision of the Division Bench in Anuradha Kaushik and Others Vs. Varun Ground Water Development Corporation and Others, wherein the Division Bench referred to Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others, and New India Assurance Co. Ltd. Vs. Rula and Others, and came to the conclusion that where the tanker was parked negligently in the middle of the road, no red signal given to indicate parking and the van dashed with tanker from behind, drivers of both the vehicles held to be liable and in the light of the same, the same being contributory negligence, Tribunal rightly apportioned liability between the parties as 50:50 and no case made out for reversing the same. The counsel for contesting respondents-claimants placed strong reliance on Karri Nagapadma Sridevi and Another Vs. Oriental Fire and General Insurance Co. Ltd., Kakinada and Others, wherein the Division Bench while referring to General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, and U.P. State Road Transport Corporation and Others Vs. Trilok Chandra and Others, observed at para 6 as hereunder:

(6) It is a settled proposition that whoever alleges the act of rash and negligent driving on the part of the other, has to prove the same by adduction of satisfactory evidence. In the instant case, PWs 1 and 2 are not eyewitnesses and the minor child, who sustained injuries and who was being carried in arms by her late mother Syamala was only 5 months old and then we have got only the evidence of PW 3, who was proceeding on the same road on bicycle and in fact, he was overtaken by Luna moped being driven by late Karri Veera Reddy just before the accident. The evidence of PW 3, the lone eyewitness, was accepted by Motor Accidents Claims Tribunal. The said witness has clearly and categorically

stated that he was going on his bicycle on the left side of road-cum-rail bridge of Rajahmundry towards Kovvur and Luna moped being driven by late Veera Reddy with his wife late Syamala being the pillion rider holding the minor child, Nagapadma Sridevi, has overtaken his bicycle and then proceeded in front of him on the left side of the road slowly and that the lorry came from the opposite direction from Kovvur side and was being driven in a rash and negligent manner and dashed against Luna moped resulting in fatal injuries to late Veera Reddy and late Syamala, who died on the way to hospital and injuries to the minor child. There is no rebuttal to his evidence and it is surprising that the Motor Accidents Claims Tribunal has just assumed contributory negligence on the part of the deceased Karri Veera Reddy on the ground that "the collision could have been avoided if any of the two drivers of the vehicles were prudent and cautious. Therefore, I feel that the occurrence is due to contributory negligence of both drivers of the two motor vehicles and I find the issue No. 1 in all the O.Ps. accordingly". This finding has been just affirmed by the learned single Judge of this court in C.M.A. Nos. 974 and 1027 of 1986 as a matter of course without even probing into the evidence of PW 3. PW 3's evidence is so clear, consistent and cogent that there was absolutely no fault on the part of late K. Veera Reddy while driving Luna moped and that it was the lorry, which was coming in the opposite direction at a high speed and in a rash and negligent manner, dashed against Luna moped resulting in injuries to the child and the death of her parents. The assumption of contributory negligence is casual and baseless. There cannot be any assumption against the clear and cogent eyewitness account of PW 3 whose testimony was not at all doubted. In fact, contributory negligence has to be proved after the negligence of respondent No. 3 is proved and respondent No. 3, driver remained ex parte and there is no rebuttal evidence at all to come to the conclusion of contributory negligence. Contributory negligence is a matter of proof and not an assumption. In view of the above, the finding of contributory negligence recorded by the Motor Accidents Claims Tribunal and affirmed by the learned single Judge is set aside and it is held that the accident occurred due to rash and negligent driving of the lorry by the respondent No. 3 driver.

Further, strong reliance was placed on Shaik Babumiya and Others Vs. General Manager, APSRTC, where the learned Judge of this court observed at para 4 as hereunder:

(4) Respondent admitted the accident involving the deceased. The specific case of the respondent, in the counter filed on its behalf is that the deceased herself was responsible for the accident because she tried to board the bus while it was in motion. The evidence of PW 1 shows that the driver of the bus started the bus even without a signal and took it in the reverse direction and so the deceased fell down. He produced, Exh. A1, copy of the first information report issued in connection with the accident and Exh. A4 copy of the charge-sheet filed by the police against the driver of the bus u/s 338 of the Indian Penal Code in connection with the accident. Though appellants adduced prima facie evidence to

show that the accident occurred due to rash and negligent driving of the driver of the bus belonging to the respondent, respondent did not choose to examine either the driver of the bus or the conductor to swear to the facts and circumstances relating to the accident. So, an adverse inference has to be drawn against the respondent for not examining either the driver or the conductor of the bus in support of its case that the deceased tried to board the bus while it was in motion after the conductor gave a signal and that there was no fault on the part of the driver of the bus belonging to it. Therefore, it can be taken that the accident occurred due to rash and negligent driving of the bus by its driver.

In *Amarjit Kaur and Others Vs. State of Punjab and Others*, while dealing with the concept of negligence and duty of care, tractor-trolley was parked on half portion of the road and when motorcyclist dashed against it in the night resulting in his death and there was no evidence that tractor-trolley had warning lights, red lights or any reflectors to warn the drivers of other vehicles, tractor driver had not taken any precaution so that drivers of any other vehicle could locate the parked vehicle in the night time, the finding of the Tribunal that tractor driver was rash and negligent was upheld in the appeal. *Premlata Nilamchand Sharma v. Hirabhai Ranchhodbhai Patel*, 1983 ACJ 290 (Gujarat), was relied upon. In *Sharad Vs. Baldeo Raj and Another*, it was observed at para 8 as hereunder:

(8) The Tribunal has also held that the claimant cyclist was negligent in riding on the bicycle and, therefore, the Tribunal has deducted 50 per cent from the amount of compensation which has been computed by him to the extent of Rs. 25,000. In this context it would be relevant to note that in absence of any evidence to show that there were two cyclists on the road and that they had dashed each other and, therefore, the claimant had fallen down and sustained injuries, cannot be accepted. When it reveals that claimant was riding on his bicycle and the dash has been given to the bicycle from the back side, then it is not possible to accept the contention of the respondent No. 2 that claimant was negligent in riding on his bicycle. The driver of the truck was expected to exercise due care and skill in order to avert the accident but instead, he straightaway gave dash to the bicycle of the claimant and that too in the broad daylight at about 9 a.m. Hence, this court is of the considered view that Claims Tribunal has committed an error in deducting 50 per cent of the amount of compensation on account of contributory negligence and it is obvious that this is not a case wherein it could be said that the accident occurred due to the rash and negligent riding of the bicycle. To this extent the award deserves to be modified.

In *National Insurance Co. Ltd. Vs. Abhay Singh Yadav and Others*, it was held at paras 5 and 6 as hereunder:

(5) Admittedly, the occurrence took place in February, a winter month, when the sun sets early and the night begins. Admittedly, the alleged accident took place at about 7.30 p.m. in the night. According to the site plan, the truck was parked in front of a dhaba, which had sufficient land for parking of the truck. But even

then, the truck driver chose not to park the truck in the land between the dhaba and the road, but chose to park the truck on the left hand side of the road. According to the witnesses, the truck had no reflectors, blinkers, indicators or even a line of stones around it to clearly indicate its stationary position to the vehicles which were moving behind it. The truck driver while parking the truck in such a haphazard manner owed a duty to the public at large to indicate that the truck had been parked on the road itself. Even assuming that the truck was parked on an emergency basis, the driver was required to give some indication to the public by turning on the indicators, stop lights or by placing stones around the truck that the truck was stationary and not moving. None of these precautions were taken by the truck driver. Hence, the truck driver was clearly negligent in parking the truck on the road itself.

(6) According to the witnesses, the jeep driver was driving the jeep at a moderate speed. Just after twilight, in the beginning of the night fall, the jeep driver might have presumed that the truck was also moving as there was no indication that the truck was parked. Merely because one of the passengers stated that he realised that the truck was stationary, such awareness cannot be imputed to the jeep driver. Hence, it is difficult to conclude that the jeep driver was negligent when the jeep collided with the stationary truck. Thus, the first contention raised by the learned counsel for the appellant does not have any force. Since the negligence was solely on the part of the truck driver, there was no necessity for the respondent Nos. 1 and 2 to array the owner and insurance company of the jeep as party-respondents in the claim petition. Therefore, second contention of the learned counsel for the appellant also fails.

In *Kore Laxmi and Others Vs. United India Insurance Company Limited and Others*, it was held at paras 6 and 7 as hereunder:

(6) Learned counsel for the appellants having brought to our notice that section 163-A of the Motor Vehicles Act stated that though this provision was brought to the notice of the learned single Judge, the appeal was dismissed by the learned Judge without adverting to their contention, we do not want to go into the controversy as to whether this section was brought to the notice of the learned single Judge or not. It is suffice to state that the general rule of proving rash and negligent driving to claim compensation under Motor Vehicles Act was diluted by introduction of this section. This being welfare legislation is intended to provide financial assistance to the dependants of the person involved in a road accident and incurred inability or suffered death. Hence, we have no hesitation to hold that the dependants of the deceased person are having option either to approach the Commissioner under the Workmen's Compensation Act since the person died during the course of his employment or u/s 163-A of the Motor Vehicles Act. Since the provisions of Motor Vehicles Act are more beneficial, the claimants rightly approached the Tribunal under the Motor Vehicles Act. The learned counsel for insurance company strenuously contended that the claimants filed application u/s 166 of the Act and as such the court below gravely erred in

applying the Table given in Second Schedule to Motor Vehicles Act u/s 163-A of the Act. This objection cannot be sustained at this point of time, since the Apex Court as early as in 1950 held that even if a party approached the court invoking a wrong provision, the court is always bound to do justice by applying the correct law. Though the learned District Judge did not specifically state that he was passing the award u/s 163-A of the Motor Vehicles Act, the very fact that he applied the section in awarding compensation indicates that he is conscious of the fact that he was passing the award u/s 163-A. Hence, this contention cannot hold water.

(7) For the foregoing reasons, we have no option except to set aside the judgment of learned single Judge in A.A.O. No. 2577 of 1999 and restore the award and decree of the Tribunal made in O.P. No. 231 of 1996, dated 23.6.1998.

In Hajarilal and Others Vs. Lakhanpratap and Others, it was held at paras 11, 12 and 16 as hereunder:

(11) In this case, maker of the F.I.R. Ramdayal, AW 1, was examined and he has contradicted the story narrated in the F.I.R. and the insurance company has not produced any other document to prove the nature of evidence that at the time of accident the deceased were travelling in the truck. The insurance company has also not filed the record of criminal case as well has not produced any other witnesses who were cited as witnesses in the criminal case. The owner of the vehicle has also not produced any evidence nor he has examined the driver of the vehicle. Therefore, when the story of F.I.R. is contradicted by its maker, the same cannot be accepted. This court is only bound to accept the evidence available on record and as produced by claimants. The claimants have come with a story that they were standing and waiting for the bus and they were not travelling in the truck. Ramdayal, AW 1, is also an eyewitness of the incident. There is no effective cross-examination of Ramdayal, AW 1, either by the insurance company or by the owner. Therefore, this court is bound to accept the evidence produced by the claimants. If there is a breach of policy by the owner or driver of the vehicle, it was the burden on the insurance company to prove the breach of the policy. Therefore, in view of the evidence on record, we hold that the claimants have proved their case that they were standing and waiting for the bus and at that time accident took place from the said truck. It is also not in dispute that if the owner has come with a case that the insurance company is liable then it was also his duty to produce the driver and other evidence to prove that the accident took place when the deceased were crossing the road but except in the written statement there is nothing on record to believe on this contention of the owner. Therefore, the contention of the owner cannot be accepted in the absence of any proof.

(12) Thus, in view of the evidence on record and under the facts and circumstances of the case, the owner, driver and insurance company are jointly and severally liable for the compensation. Insurance company shall initially pay the compensation but it will have liberty to recover the same amount from the

owner of the vehicle as the owner has not produced any evidence.

(16) Under the facts and circumstances of the case that the insurance company has not produced the documents of the criminal case and has not produced any evidence to prove that at the time of accident the deceased were travelling in the truck, we hold that initially the insurance company is liable to satisfy the award in favour of the claimants but in such a case it is also the duty of the owner of the vehicle to come forward and to lead evidence that the deceased were not travelling in the truck and they were third party. The driver could have been the best witness for this purpose but the owner of the truck has failed to produce the driver in the evidence. The owner has also failed to produce the insurance policy. In fact it was the burden on the owner of the vehicle to prove that deceased persons were not travelling in the truck and they were third party. In a case of breach of contract where the insurance company could establish breach of terms and conditions of the policy on the part of the owner of the vehicle, this is the settled position under the law that the insurance company can recover the awarded amount from the owner or the driver of the vehicle, as has been held by the Supreme Court in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, Therefore, it is directed that the insurance company shall satisfy the award but the insurance company shall have liberty to recover the said amount from the owner if the owner is not able to prove that they were crossing the road and were not travelling in the truck and owner has not committed any breach of the terms of the policy. If any such application is filed by the insurance company, the Tribunal shall enquire the question of recovery, independently without getting influenced from the finding of this appeal.

In New India Assurance Co. Ltd. Vs. Komma Venkateswarlu (died) through L.Rs. and Another, it was held at para 6 as hereunder:

(6) In National Insurance Co. Ltd. Vs. Swaran Singh and Others, the Hon'ble Supreme Court, while explaining the above-mentioned two contingencies, held that merely on the ground that there was no valid licence or no licence, the liability of the insurer cannot be absolved totally. In both the situations the Motor Vehicles Act being a beneficial piece of legislation, it was held by the Apex Court that insurer shall pay the compensation initially and recover the same from the insured later.

In United India Insurance Co. Ltd. (The) Vs. Smt. Rekha and Others, it was held at paras 16, 30, 33 and 35 as hereunder:

(16) The substratum of submissions of learned counsel for the appellant insurer has been that the statute does not require compulsory coverage of the risk of the driver of the motor vehicle and, therefore, no liability in this relation could be fastened on the insurer even if it was an application u/s 163-A of the Act; and that the legislature never intended to provide for compensation u/s 163-A of the Act to the victim or his heirs for the exclusive fault or negligence of the victim himself.

(30) Thus, it is clear that the scheme of section 163-A of the Act has come on its fuller exposition by the Hon"ble Apex Court in the cases of Hansrajbhai V. Kodala, 2001 ACJ 827 (SC) and Deepal Girishbhai Soni, 2004 ACJ 934 (SC) and there remains no doubt with these pronouncements that section 163-A of the Act covers the cases where the negligence is on the part of the victim himself.

(33) It may be pointed out that the submission made on behalf of the insurer with reference to sub-section (4) of section 140 is neither of any meaning nor of any assistance for the question at hand because as noticed above, liability to pay compensation u/s 140 of the Act has been ruled to be essentially of interim measure and being in addition to section 166 of the Act. In order to make the provisions of sub-sections (1) and (2) of section 140 meaningful and operative, sub-section (4) has been inserted thereto so that such fixed amount of compensation for no fault liability is not defeated for any contribution on the part of the victim towards the accident and the injuries. Omission of such provision in section 163-A does not lead to the effect that section 163-A would not cover the cases where negligence is on the part of the victim. In fact, such provision as sub-section (4) of section 140 was neither needed nor could have been there in section 163-A of the Act, that being a Code in itself and intended to provide relief as a social security measure notwithstanding anything else contained in the Act or any other law. In view of the law explained by the Hon"ble Apex Court in Hansrajbhai V. Kodala, 2001 ACJ 827 (SC) and Deepal Girishbhai Soni, 2004 ACJ 934 (SC), the submission to the contrary by the insurer cannot be countenanced.

(35) In the ultimate analysis, the submission as made by learned counsel for the insurer that the claim for compensation could not have been maintained for negligence of the victim himself deserves to be and is rejected.

Reliance also was placed on P.V. Subba Rao and Another Vs. Sunkari Varahamma and Another, and Subbalakshmi Vs. R. Palaniswamy and Another,

13. On an overall appreciation of the facts, the Tribunal below, since there was no contra evidence placed on behalf of the appellant-respondent No. 2 after recording findings in detail and also relying on the evidence of eyewitness, PW 2, clear findings had been recorded relating to the negligence. In the absence of any contra evidence, the contentions advanced by the counsel for appellant insurance company cannot be accepted by this court. Hence, the findings recorded by the Tribunal below are hereby confirmed.

Point No. 2:

14. In the result, the M.A.C.M.A. being devoid of merit, the same shall stand dismissed. No order as to costs.