HIGH COURT OF ANDHRA PRADESH

WEDNESDAY ,THE NINETEENTH DAY OF APRIL

TWO THOUSAND AND TWENTY THREE

PRSENT

THE HONOURABLE SRI JUSTICE T MALLIKARJUNA RAO

MOTOR ACCIDENT CIVIL MISCELLANEOUS APPEAL NO: 316 OF 2013

Between:

1. VALLAM SHOBHAVATHI & 5 OTHERS W/o Late V.Narasimhulu, 1st Wife,
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.
2. Vallam Pushpendra S/o Late V.Narasimhulu,
   minors,
   Rep. by their Mother, natural guardian
   and next friend let Petitioner
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.
3. Vallam Yuvalatha D/o Late V.Narasimhulu,
   minors,
   Rep. by their Mother, natural guardian
   and next friend let Petitioner
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.
4. Vallam Shobha Rani W/o Late V.Narasimhulu, 2nd Wife
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.
5. V. Kusuma Latha D/o Late V.Narasimhulu, Minor, Rep. by her Mother,
   Natural guardian and next friend 4th Petitioner
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.
6. Gangulamma W/o V. Veerappa, Hindu,
   residing at Masakavankapalli Village,
   Kurumala Post, Nallamada Mandal,
   Anantapur District.

...PETITIONER(S)

AND:

1. B.S. HARISH & ANOTHER S/o B.V. Some Gowda, Hindu, Major, Owner of Lorry KA 21 A 1764
   R/o Vinayaka Nagara, Putturu,Chittoor District.
7. Oriental Insurance Company Limited, Rep. by it's Divisional Manager, Anantapur.

...RESPONDENTS

Counsel for the Petitioner(s): MAHESWARA RAO KUNCHEAM

Counsel for the Respondents: B NAGA SAILAKSHMI

The Court made the following: ORDER

2023:APHC:20951

HON'BLE SRI JUSTICE T. MALLIKARJUNA RAO

M.A.C.M.A. No. 316 OF 2013

JUDGMENT:

1. Aggrieved by the Award and Decree dated 02.08.2012 in M.V.O.P. No.600 of 2009 passed by the Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge (F.T.C.), Anantapur (hereinafter will be referred to as 'Tribunal'), the claimants filed this appeal questioning the correctness of the Tribunal's Award in not fastening the liability on the 2nd respondent/Insurance company.
2. For convenience, the parties hereinafter will be referred to as per their rankings in the M.V.O.P.
3. The claimants/appellants filed a petition U/s.163-A of the Motor Vehicles Act, 1988 (hereinafter will be referred to as 'Act') for compensation of Rs.4,00,000/- on account of the death of Vallam Narasimhulu (hereinafter will be referred to as 'deceased') who died in a Motor vehicle accident.
4. The claimant's case is that on 17.04.2009, the deceased boarded the auto-rickshaw bearing No.AP02-TRAB 6644 at Kadiri, along with five passengers, when it reached Weavers colony Saraswathi Vidya Mandir while the auto was proceeding on the extreme left side of the road, the lorry bearing No.KA-21-A-1764 (hereinafter will be referred to as

'offending vehicle') came from the Hindupur side driven by its driver at high speed and dashed the auto, due to which the deceased sustained bleeding injuries; immediately he was shifted to Government Hospital, Kadiri, along with other injured, thereafter while he was moving to Government General Hospital, Anantapur he died on the way. A case was registered against the offending lorry driver vide crime Nos.92 of 2009 under sections 337, 304-A I.P.C., the 1st respondent being the owner of the lorry, the 2nd respondent being its insurer.

5. The 1st respondent remained exparte.

6. The 2nd respondent filed its written statement and contended that the petition is flawed for non-joinder of the necessary party i.e., the offending vehicle's driver. He did not have a driving license at the time of the accident. There is a violation of policy conditions.

7. The second respondent/insurance company filed an additional written statement stating that one B.S.Harish issued a cheque bearing No.315899, dated 04.08.2008 for Rs.99,445/- drawn on Canara Bank, B.Chaganahalli Branch towards premium for his two vehicles including the crime vehicle bearing No.KA-21-A-1764 for Rs.51,681/- to the second respondent/Insurance company was deposited in H.S.B.C. for collection; it was

returned with an endorsement as no sufficient funds. The second respondent issued a letter to the first respondent informing the policy issued to the crime vehicle stands cancelled due to non-receipt of consideration. Thus, the second respondent/Insurance company is not liable to pay any compensation.

8. Based on the pleadings, the Tribunal framed relevant issues. During the trial, P.Ws.1 and 2 got examined and marked Exs.A.1 to A.7 on behalf of the claimants. R.W.1 got examined on behalf of the respondents and marked Exs.B1 to B8.

9. On appreciation of the oral and documentary evidence, the Tribunal held that the deceased died due to injuries in the accident. The 1st respondent was held liable to pay the compensation of Rs.3,37,000/- with interest at 7.5% per annum from the date of the petition. However, the claim against the 2nd respondent is dismissed.

10. I have heard the learned Counsel for the respective parties.

11. To avoid undue duplication, the contentions ardently advocated on behalf of both parties shall be referenced and deliberated upon in the ensuing part of this Judgment. I have given my anxious consideration to the submissions made by

2023:APHC:20951

the respective learned Counsel and perused the material on record.

12. Now, the point for consideration is whether the Tribunal was justified in not fastening the liability on the insurance company?

P O I N T:

13. There is no dispute to the Tribunal's finding that the deceased died due to injuries sustained in the accident. The Tribunal's finding that as it is a petition filed under Section 163-A of the MV Act, the petitioner need not prove rash or negligent act on the part of the offending vehicle's driver holds good. When the claimants need not plead or prove the aspect of the negligence, the issue of negligence would not arise while considering the application under Section 163-A of the MV Act. The other appellants' contention is that the Tribunal has not properly considered the deceased's income. As Tribunal's order assessed the deceased's yearly earnings at Rs.36,000/- per annum by giving reasons, it need not be interfered with. The second schedule appended to Section 163-A of the Act manifestly indicates that the maximum earnings limit has been fixed at Rs.40,000/-.

14. It is not in dispute that the 2nd respondent/Oriental Insurance Company Limited issued Ex.B1 policy bearing No.421500/31/2009/2762 and the cover note No.420000296324, dated 04.08.2008, to the offending vehicle. The evidence of RW.1 – K.Ram Gopal, Senior Assistant in the 2nd respondent's company, shows that the 1st respondent issued a cheque bearing No.315899, dated 04.08.2008 for Rs.99,445/- drawn on Canara Bank, Beechaganahalli Branch towards insurance premium for his two vehicles including the crime lorry bearing No.KA-21-1764 i.e., for Rs.51,681/-, the cheque was deposited in their bank HSBC for collection. The same was returned as funds were insufficient. The evidence of RW.1 is established by Ex.B3 - Deposit of cheque for collection to HSBC with all particulars, Ex.B4 – Letter issued by R-2 to the Manager, Canara Bank, Beechanganahalli Branch concerning cheque and Ex.B5 – Letter issued by Canara Bank to the company about the return of cheque issued towards premium for offending vehicle due to insufficient funds. The Tribunal's finding regarding dishonour of cheque is not assailed by the appellants and 2nd respondent. The correctness of the Tribunal findings that an inference can be drawn that the 1st respondent received the endorsement sent by the 2nd

respondent/Insurance company vide Ex.B6 letter; the 1st respondent learned about the cancellation of a policy in September 2008 are questioned in this appeal.

15. At the outset, the learned Counsel for the 2nd respondent/Insurance company contends that no privity of contract came into existence between the insured and the insurer and as such, the question of enforcing the purported contract of insurance while taking recourse to Section 147 of the Motor Vehicle's Act did not arise. He also contends that on the date of the accident, the offending vehicle was not insured with the company as the insurance policy already stood cancelled before the accident, as the cheque against the premium amount was not cleared. The cheque was dishonoured, and consequently, due to non-receipt of the premium amount, the Insurance Company cancelled the policy. He would also contend that, in fact, in the policy, it is mentioned that it is "warranted that in case of dishonour of premium cheque(s), the company shall not be liable under the endorsement and the endorsement shall be void ab initio". He has referred to Section 64 V of the Insurance Act and Section 25 of the Indian Contract Act, 1872.

Section 64VB of the Insurance Act mandates that before a contract of insurance comes into being, the premium should be received by the insurer in advance, stating :

"Section 64VB - No risk to be assumed unless premium is received in advance (1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until a deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.
Explanation.-Where the premium is tendered by postal money order or a cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be."

Under Section 25 of the Contract Act, an agreement made without consideration is void. Section 65 of the Contract Act says that when a contract becomes void, any person who has received any advantage under such contract is bound to restore it to the person from whom he received it. So, even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonoured, the insurer is entitled to get the money back.

16. In the case of **Oriental Insurance Co. Ltd. vs. Inderjit Kaur & Ors.**[1], the Hon'ble Apex Court held that "Despite the bar created by Section 64-VB of the Insurance Act, the appellant, an authorized insurer, issued a policy of insurance to cover

[1] **(1998) 1 SCC 371**

the bus without receiving the premium therefor. By reason of the provisions of Section 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

17. The Hon'ble Apex Court in **New Asiatic Insurance Co. Ltd. vs Pessumal Dhanamal Aswani & Ors[2]., ** held that "the rights of the third party to get indemnified can be exercised only against the insurer of the vehicle. It is thus clear that the third party is not concerned and does not come into the picture at all in the matter of payment of premium. Whether the premium has been paid or not is not the concern of the third party, who is concerned with the fact that there was a policy issued in respect of the vehicle involved in the accident. It is based on this policy that the claim can be maintained by the third party against the insurer.

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[2] A.I.R. 1964 SC 1736

18. In the light of the above well-settled legal position, the contention raised by the learned Counsel for the Insurance Company, that the insurance company has no liability to pay the compensation because of the dishonour of the cheque is not sustainable.

19. The learned appellants' Counsel contends that since the insured had not received the information allegedly conveyed by the insurance company about the dishonour of the cheque, the insurance company cannot disown its liability.

20. At this stage, it would be fruitful to refer to case in **National Insurance Company Limited., Ongole V. Oburi (Oguri) Umamaheswara Rao and others**[3]**,** wherein the Common High Court of A.P. at Hyderabad held that

> **"***If the ratio laid down in the above judgments is applied to the facts of the present case, the appellant insurance company could be able to prove that it had sent a letter to the insured conveying the information about the dishonour of cheque as well as cancellation of cover note and policy. The letter was returned with an endorsement that "no such addressee". The insurance company sent a letter on 27.02.1996, and the accident in the present case occurred on 01.12.1996, i.e. ten months after the cancellation of the policy by the insurance company and after conveying the said information to the insured through a letter. As has already been noticed, the actual receipt of the notice or information sent by the insurance company by the insured is not a requirement under law. It is enough if the information is sent by the insurance company to the address furnished by the insured in the cover note or the policy. Thus, it is no longer open to the insured to contend that since he did not actually receive the letter sent by the insurance company, the insurance company is still liable to pay compensation to the claimants.*

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[3] **2011 (4) ALD 254**

21. In the case of **United India Insurance Co. Ltd Vs. Laxmamma and others**[4], the Hon'ble Apex Court considered the question whether the Insurance Company (insurer) is absolved of its obligations to the third party under the policy of insurance because the cheque given by the owner of the vehicle towards the premium amount got dishonoured and after the accident, the insurer cancelled the insurance policy, and while considering the question, the Hon'ble Apex Court held as under:-

> "In our view, the legal position is this: where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and the such cheque is returned dishonoured, the liability of the authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy an award of compensation because of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident, in other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards the premium. The cheque gets dishonoured, and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases. The insurance company is not liable to satisfy compensation awards in respect thereof.

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[4] **A.I.R. 2012 SC 2817**

22. Upon meticulous scrutiny of the records, it is evident that the 2nd respondent has not contended that a letter dispatched by it was received by the insured. Rather, it has contested that the information was conveyed to the address as provided by the insured in the cover note or policy. In light of the aforementioned decision, the factual position shall be judiciously considered to ascertain whether the information was indeed transmitted to the address as furnished by the insured.

23. According to the 2nd respondent/insurance company, it has addressed Ex.B6 letter to the insured regarding the cancellation of the policy. Since the insurance company did not possess documents to show the sending of notice to the insured, it addressed Ex.B7 letter to the Post Master. In Ex.B7 letter dated 25.10.2010, the insurance company informed the Post Master that they had sent a letter containing 'Dishonour Cheque Notice' on 05.09.2008 to the following addresses :

1. Sri. B.S. Harish, S/o Sonneguda, Vinayakanagar, Puttur.
2. The Sub Inspector of Police, Puttur.
3. The Regional Transport Office, Puttur.

And also requested to confirm that the above-said letter was sent to the respective addresses to enable them to submit it to M.A.C.T. Court.

24. It is pertinent to note that the 2nd respondent/insurance company has not placed documentary evidence to show whether the Post Master responded to Ex. B7 letter and furnished any information. In this regard, RW.1 testified that only after filing the claim petition they sent a letter to Canara Bank vide Ex.B5 and also addressed Ex.B7 letter to the Post Master, and they have not received any reply from the Post Master. Had the Post Master furnished information in response to Ex.B7 letter, and it is favourable to the 2nd respondent's case, indeed, it could have relied on the information. It is natural that had it not received any information, the 2nd respondent would have taken further steps to get such information. Be that as it may, without such communication from the Post Master, this Court views that much credence cannot be attached to the contents of the Ex.B7 letter. However, RW.1 denied the suggestion that they created documents only to strengthen their case.

25. The 2nd respondent has relied on Ex.B8 Certified Copy of Postal Receipts to show the sending of notices to all the concerned, including the insured. As seen from Ex.B8, it is titled as Certified True Copy by the Senior Divisional Manager of Oriental Insurance Company. For the reasons best known, the insurance company has not placed postal receipts issued by Postal Department or offered a reason for not producing the same. It has not been explained as to whether the Senior Divisional Manager of the 2nd respondent issued Ex.B8 'Certified Copy' after verification of original receipts. The Senior Divisional Manager was not examined to establish the same. It is noteworthy at this juncture when the postal receipts have been in the custody of the 2nd respondent, it is expected offer a plausible explanation for non-production of the receipts. Viewed from a different angle, had the postal receipts been in the 2nd respondent's custody, there would be no reason to address a letter to the Post Master in this regard. They could have directly relied on postal receipts. The possibility of fabricating Ex.B8 document with the intent of bolstering its case to evade the obligation of payment of compensation cannot be entirely precluded. It is pertinent to note that while the presumption of service of notice, as per the statute, may arise when a communication

is dispatched by registered post in accordance with Section 27 of the General Clauses Act, such presumption may also be invoked under Section 114 of the Indian Evidence Act. Even in cases where a notice is returned with an endorsement indicating refusal of acceptance by the party, a presumption of valid service may still be inferred. Such a notice should be construed liberally.

26. The insurance company relies on Ex.B6 – letter dated 04.09.2008 to show that it had informed that the 1st respondent about the dishonour of cheque and the policy cancellation. What is most significant to be noted is that no material is placed to show the sending of such information to the insurer. A presumption under Section 114 of the Evidence Act cannot be drawn.

27. I am constrained to hold that, it would be clear from the preceding discussion that though the 2nd respondent/ Insurance company cancelled the insurance policy consequent to the dishonour of cheque on account of insufficiency of funds before the accident took place, it is apparent from the record that it failed to produce the evidence to show that all concerned including insurer have been intimated about it. The principle laid down by Hon'ble Supreme Court in Laxman's case is that when the contract of

insurance has been cancelled, all concerned have to be intimated, is not complied with.

28. Based on the established legal principles, it is important to note that if the insurance company cannot provide evidence of sending notice to the insured to the correct address regarding the cancellation of a policy due to a dishonoured cheque, then the insurance company cannot escape from its liability. This is because the insurance company did not give the insured an opportunity to pay the premium after the cheque was dishonoured. In my opinion, the Tribunal was wrong in not holding the insurance company responsible for compensating the owner of the vehicle for the loss.

29. It transpired from the record that no appearance had been made on behalf of the insured despite service of notice; the insured has not contested in M.V.O.P. and did not adduce any evidence. It is apt to note that even the insurer or claimants did not take any steps to examine the offending vehicle's owner. It goes without saying that the premium was never paid by the insured. Ex.B1 policy shows cancellation of policy on account of dishonour of cheque. In the light of contentions raised in the claim petition, this Court views that the insured should have explained his stand regarding the dishonour of the cheque and giving intimation to him by the

2023:APHC:20951

insurer. Despite passing Tribunal's Award granting compensation against the 1st respondent alone, he has not preferred any appeal. In the case facts, this Court views that pay and recovery can be ordered.

30. As a result, the appeal is *partly* allowed without costs by setting aside the order of dismissal passed by the Tribunal against the 2nd respondent/Insurance company and confirming the quantum of compensation, as awarded by the Tribunal. However, with a direction to the 2nd respondent/insurance company first to pay the compensation to the claimants and thereafter recover the same from the offending vehicle's owner i.e., 1st respondent. The rest of the order passed by the Tribunal holds good.

31. Miscellaneous Petitions, if any, pending in these appeals shall stand closed.

T. MALLIKARJUNA RAO, J

Dt. 19.04.2023.
KGM