

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH**

MACMA No.347 of 2009

Between:

The New India Assurance Company Ltd.
Rep. by its Divisional Manager, Ongole. Appellant

And

Korrapolu Danaiah and
others.
... Respondents

DATE OF JUDGMENT PRONOUNCED: **11.08.2015**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether Their Lordship wish to
see the fair copy of the Judgment? Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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! Counsel for Appellant : Sri Naresh Byrapaneni

^ Counsel for Respondent Nos.1 & 2 : Sri N. Krishna Murthy

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> Head Note:

? Cases referred:

- 1) 2009 ACJ 187 (AP)
- 2) 2013 (6) ALD 89
- 3) (2006) 4 SCC 404
- 4) 2009 ACJ 1127 (AP) = MANU/AP/0233/2008
- 5) 2007 ACJ 1235 (Gujarat) = MANU/GJ/8262/2006
- 6) 2000 (1) LL.J. 1656 (SC) = MANU/SC/0312/2000
- 7) 2014 ACJ 1 (Kerala) = MANU/KE/0641/2013
- 8) 2012 ACJ 1 (SC) = MANU/SC/1374/2011
- 9) AIR 2004 SC 1531 = MANU/SC/0021/2004
- 10) 2004 (2) KLT 395 = MANU/SC/0246/2004
- 11) (2008) 5 SCC 736 = MANU/SC/2091/2008

**THE HONOURABLE SRI JUSTICE U.DURGA PRASAD
RAO**

M.A.C.M.A.No.347 of 2009

JUDGMENT:

The New India Assurance Company Limited who is the second respondent in MVOP No.144 of 2008, challenged the award passed by MACT, Markapur questioning the liability fastened on it.

2) Brief facts of the case are that:

a) On 03-05-2003 the deceased—Korrapolu Chinna Mark and some others engaged a jeep bearing No.AP 07 X 4480 to go to Ongole for attending APRJC Entrance Examination, but on the way a lorry bearing No. AA D 2877 came in opposite direction and accident took place due to collision between two vehicles resulting in death of six persons including Chinna Mark and injuries to some others.

b) The claimants who are the parents of deceased, filed MVOP No.144 of 2008 under Section 163-A of Motor Vehicles

Act, 1988 (for short "MV Act") against respondent Nos.1 and 2, who are the owner and insurer of the jeep respectively and respondent No.3 who is the owner of the lorry and claimed Rs.2,30,000/- as compensation.

c) Respondent No.1/owner of the jeep mainly contended that accident was occurred due to fault of driver of the lorry and hence he is not liable to pay compensation and even otherwise, he insured his jeep with R2/Insurance Company and hence, R2 has to indemnify the liability of R1 if any.

d) Respondent No.2/Insurance Company contended that lorry driver was responsible for the accident which is evident from the crime record and hence, it cannot be held responsible. It further contended that the name of first respondent is shown as K.Kalebu S/o Gangaiah (kesim) in the claim petition, whereas in the policy it is mentioned differently as Shaik Rasheed, S/o Khasim, R/o Baptla and so, R2 is not liable to pay compensation.

e) Respondent No.3/owner of lorry in his counter contended that he is not the owner of the lorry and he sold away his vehicle on 17.10.2002 to one K. Parameswara Reddy and he is not answerable to the claim.

f) During trial, PW1 was examined and Exs.A1 to A6 were marked on behalf of claimants. RWs.1 and 2 were examined and Ex.B1—policy was marked on behalf of respondents.

g) On appreciation of both oral and documentary evidence the Tribunal so far as fault is concerned, held that drivers of both the vehicles were at fault. Liability is concerned, it

observed that jeep was sold to R1 after obtaining policy and it was in force by the date of accident and so, R1 and R2 were liable. R3 is concerned, it held R3 failed to establish that he sold away his vehicle and he was not the owner of the lorry by the date of accident. Thus, it fixed liability on all the three respondents and awarded compensation of Rs.2,29,500/- with costs and interest at 8% p.a.

Hence, the appeal by the Insurance Company.

3) The parties in this appeal are referred as they stood before the Tribunal.

4) Heard arguments of Sri Naresh Byrapaneni, learned counsel for appellant/Insurance Company and Sri N. Krishna Murthy, learned counsel for respondents 1 and 2. Notices sent to R3 and R4/owners of jeep and lorry were served but there is no representation on their behalf hence, treated as heard.

5) The argument of learned counsel for appellant/Insurance is three fold:

a) The Tribunal having observed the drivers of both the vehicles are responsible ought to have apportioned liability to facilitate owner of each vehicle to pay compensation accordingly.

b) Ex.B1—policy is an act only policy and it will not cover the liability of passenger in the jeep since no extra premium is paid. The Tribunal thus erred in fastening liability on it.

c) It being a claim under Section 163-A of MV Act,

following the Second Schedule therein, the Tribunal should have taken gross notional annual income of the deceased at Rs.15,000/- but instead, it took the net annual income at Rs.15,000/-.

6 a) Per contra, learned counsel for respondents/claimants firstly argued since the accident was occurred due to composite negligence of both vehicles, the claimants are entitled to lay claim against both or any of the vehicles and Tribunal also can award compensation against all the owners and their insurers holding them jointly and severally liable and there is no need to apportion the liability of each vehicle driver. On this aspect he relied upon the judgment reported in ***Sombathina Ramu vs. T.Srinivasulu***^[1].

b) Secondly, opposing the plea of the appellant that policy does not cover the risk of the deceased, he argued such a plea was not taken in the counter and no evidence was adduced by the Insurance Company and hence, the same cannot be raised for the first time in the appeal. Even otherwise, in a claim under Section 163-A of MV Act, the Insurance Company is debarred from raising defence pleas available under Section 149(2) of MV Act in view of 'non-obstante clause' employed in Section 163-A of MV Act. In this context he relied upon the decision of this court reported in ***United India Insurance Company Limited, Hyderabad v. Katikala Indira***^[2].

c) Thirdly, the Tribunal considering the brilliance of deceased in studies and his future prospectus, aptly fixed his

net notional annual income at Rs.15,000/- and hence the same cannot be carped. He thus prayed to dismiss the appeal.

7) In view of rival arguments, the points for determination in this appeal are:

1. *Whether Tribunal erred in fixing joint and several liability on all the respondents instead of apportioning liability between them?*
2. *In a claim under Section 163-A of MV Act, whether insurer is precluded from raising statutory defence pleas available to it under Section 149(2) of MV Act?*
3. *If point No.2 is held in negative, whether the contention of insurer that Ex.B1—policy does not cover the risk of deceased is tenable?*
4. *To what relief?*

8 a) **POINT No.1:** Accident, involvement of jeep bearing No. AP 07 X 4480 and lorry bearing No.AA D 2877 and death of the deceased are admitted facts. The Tribunal having regard to the evidence on record and on the observation that in a claim under Section 163-A of MV Act the negligence of a particular driver is not relevant and the respondents too did not adduce any positive evidence showing a particular driver of the opposite vehicle alone was responsible as pleaded by them, has held that the accident was occurred on account of use of both the vehicles. It must be said the above observation of the Tribunal is correct.

b) As per Section 163-A of MV Act, the claimant shall not be required to plead or establish the death or permanent disablement in respect of which claim is made was due to

wrongful act or neglect of the driver or the owner of the vehicle or vehicles concerned or of any other person. Suffice for the claimant to prove that death or permanent disablement was caused due to the accident arising out of use of the motor vehicle(s). Since the accident was occurred due to the composite negligence of both the vehicles, the claimants can lay claim against all or any of the owners of the vehicles. In such an event, the Tribunal can fix the liability on them jointly and severally as did in the instant case. It is so held in the cited decision in **Sombathina Ramu's** case (1 supra) thus:

"10. x x x x But, however, in cases of composite negligence, the suitor, having no role to play either directly or remotely and having not contributed any negligence to the causative factors of the injury, is therefore entitled to seek compensation from all of them or any one of them. It is a choice left to him. Correspondingly, it does not lie in the mouth of one of the wrong doers to insist upon the other or all the wrong doers also either to be impleaded or proportionately mulcted with the obligation to compensate the injured."

In view of the law laid down as above, I find force in the contention of respondents/claimants.

This point is answered accordingly.

9) **POINT NO.2:** This point is concerned, the claim was admittedly one under Section 163-A of MV Act. Before considering respective contentions, it is useful to extract Section 163-A which reads as follows:

163A. Special provisions as to payment of compensation on structured formula basis.—

(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor

vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.—For the purposes of this sub-section, “permanent disability” shall have the same meaning and extent as in the Workmen’s Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.”

a) The contention of learned counsel for appellant is that the policy under Ex.B1 is liability only policy or act policy and therefore, it covers the liability of third parties and the driver of the jeep alone and it does not cover the risk of passengers like deceased since no extra premium was paid by first respondent to extend coverage to them and as such, the Tribunal erred in mulcting the liability on Insurance Company. However, having regard to the non-obstante clause employed in Section 163-A as shown above, the contention of claimants is that in a claim under Section 163-A of MV Act the defences that are generally available to Insurance Company under Section 149(2) of MV Act in claims under Section 166 of MV Act are not available in claims under Section 163-A of MV Act.

10 a) Similar issue came up for consideration before a learned Judge of this High Court in **Katikala Indira**’s case (2 supra). On factual side the deceased therein travelled in a Tata Sumo motor vehicle as passenger which went and hit a stationed lorry causing his death. In the resultant claim against the owner and insurer of the Tata Sumo, the Insurance

Company *inter alia* contended that policy in force was only an act policy and the vehicle was of private category and owner did not pay additional premium for covering the risk of passengers and hence, the liability of the deceased who travelled as passenger did not cover. The Insurance Company relied upon (i) ***United India Insurance Co. Ltd. v. Tilak Singh***^[3] and (ii) ***United India Insurance Company Limited v. Kondakotla Saroja***^[4]

Rejecting the above contention learned Judge held thus:

“23. In the instant case, facts on record disclose that the deceased died in a motor accident involving Tata Sumo vehicle insured by the appellant/respondent No.2 and the claim is made under Section 163A of the Act. Once it is proved that the accident occurred on account of the use of motor vehicle, the claimants are entitled to claim compensation and the usual defenses available to Insurance Company under Section 149(2) of the Motor Vehicles Act are not available. In view of the same, I do not see any error in the decision arrived at by the Claims Tribunal in holding the Insurance Company (appellant) also liable to pay compensation determined by the Claims Tribunal.”

b) To arrive at the above finding the learned Judge mainly relied upon the decision of Gujarat High Court reported in ***National Insurance Co. Ltd. v. Rukhshanaben Salimbhai Vora***^[5]. In that case a minor girl while traveling as pillion rider on the motorcycle driven by her father died when the thread of a kite flown on the road struck and slit her neck. Against the claim petition filed by her LRs. under MV Act, the Insurance Company took the prime plea that death was not due to a motor vehicle accident and alternatively that the deceased

was a pillion rider and her risk was not covered as no extra premium was paid. The Insurance Company, it appears, relied on the decision of the Apex Court in **Tilak Singh's** case (3 supra). Both the contentions were negated by the High Court of Gujarat. The first contention was negated basing on Apex Court judgment reported in **Rita Devi v. New India Assurance Company Limited**^[6]. We are not concerned with this observation for our case. The second contention was negated by Gujarat High Court holding that non-obstante clause with which Clause 163A (1) begins makes it clear that the liability of the Insurance Company to satisfy the award is not dependent upon any other provisions of the Act and therefore, the question whether the passenger in the motorcycle was a gratuitous passenger or a third party was not relevant. In this context, the Gujarat High Court distinguished **Tilak Singh's** case (3 supra) and held that the said judgment was rendered in an application filed under Section 166 of MV Act whereas the case on hand was one under Section 163-A of MV Act. Aggrieved by the said judgment, the Insurance Company carried the matter in appeal in Special Leave to Appeal (Civil) No.89292 of 2007 before the Apex Court but its contentions were negated by the Apex Court.

c) Thus, relying on **Katikala Indira's** case (2 supra) rendered by our High Court the claimants argued that the Insurance Company cannot plead any defenses in the line of Section 149(2) of MV Act in the present claim.

11) I am afraid this argument of claimants cannot be

countenanced in view of recent judgment of High Court of Kerala in ***United India Insurance Company Limited v. Anil Kumar***^[7].

In that case also the point for consideration was whether the insurer could raise defences available to it under Section 149(2) in a proceedings under Section 163-A. The learned Judge having considered the object of Section 163-A and referring several Apex Court judgments has held as follows:

“13. Sub-sec (2) does not preclude the opposite party from proving that the claimant or victim sustained injuries/died on account of his own wrongful act, neglect or default as the Supreme Court has held in National Insurance Co. Ltd. v. Sinitha^[8] *and followed by the Full Bench in Oriental Insurance Co. Ltd. v. Joseph (MANU/KE/0425/2012). Reading Sub-secs.(1) and (2) of Sec. 163A, it appears to me that the non-obstante clause in Sub-sec. (1) is only to the extent of making the owner or insurer of the vehicle liable to pay compensation, in the case of death or permanent disablement due to accident arising out of the use of motor vehicle as indicated in the Second Schedule no matter, what would be the compensation payable as per any other provision in the M.V.Act or any other law in force and exonerating the claimant from pleading and proving (unlike in an application under Sec.166 of the M.V.Act) that death or permanent disablement was due to the wrongful act, neglect or default of the owner of the vehicle. **The thrust of the non-obstante clause in Sec. 163A is to the liability of the owner or insurer of the vehicle to pay compensation as per the structured formula. It is difficult to accept the proposition that the non-obstante clause in Sub-sec. (1) of Sec. 163A would render all other provisions of the M.V.Act otiose in which case, one has to say that Sec. 170 of the said Act which enables the insurer to take up defences on behalf of the insured should also be denied to the insurer.** (Emphasis supplied) In such a situation, it is possible for the claimant and the insured to collude and bring an action under Sec. 163A of the Act and in such a situation, whether there is violation of the policy conditions or not, whether the policy issued is only*

an Act Only policy or not, whether a motor accident has occurred or not, once it is admitted by the insurer that it has issued a policy with respect to the vehicle allegedly involved, it would be liable to pay compensation. I am not inclined to think that the legislative intent in providing the non-obstante clause in Sub-sec. (1) of Sec. 163A was to create such a situation.”

a) Thus, the observation of the learned Judge was that the non-obstante clause in Section 163-A (1) of MV Act does not preclude the insurer from raising the defences available to it under Section 149(2) of the said Act. On the other hand, the non-obstante clause only says that irrespective of what was provided in the other provisions of MV Act or in any other law for computation of compensation in a claim under Section 163-A, the compensation has to be computed as per structured formula provided in the Second Schedule and hence the thrust of non-obstante clause is on method of computation of compensation and to that extent only it excludes the other provisions. Further, the non-obstante clause exonerates the claimants from proving the liability, neglect or default of owner of the vehicle. Except that non-obstante clause does not preclude the insurer from taking the pleas available under Section 149(2) of the said Act. To demonstrate such right of Insurance Company is not barred, learned Judge garnered strength from the observation of Honourable Apex Court in successive cases and mentioned as follows:

“14. In National Insurance Company Ltd. v. Swaran Singh^[9] Bench of the Supreme Court consisting of three Judges has laid down the defences that are available to the insurer under sec. 149(1) and (2) of the Act. The summary of the findings is given in pages 814 and 815, it is stated,

Insurer is entitled to raise a defence in a claim petition filed under S. 163A or S. 166 of the Motor Vehicles Act, 1988, inter alia, in terms of S. 149(2)(a)(ii) of the said Act.

15. In *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.*^[10], in paragraph 48, it is held as under:

By reason of the S. 163-A, therefore, the compensation is required to be determined on the basis of a structured formula whereas in terms of S. 140 only a fixed amount is to be given. A provision of law providing for compensation is presumed to be final in nature unless a contra indication therefore is found to be in the statute either expressly or by necessary implication. While granting compensation, the Tribunal is required to adjudicate upon the disputed question as regard age and income of the deceased or the victim, as the case may be. Unlike S. 140 of the Act, adjudication on several issues arising between the parties is necessary in a proceeding under S. 163-A of the Act.

16. In *Oriental Insurance Co. Ltd. v. Rajni Devi*^[11] the Supreme Court again considered the scope of Sec. 163A of the M.V. Act and liability of the insurer. In paragraph 11, it is observed:

Liability of the insurer company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise.

17. It is revealed from paragraph 12 of the said decision that as per terms of the contract of **insurance** liability of the insurer was confined to ` 1,00,000/-. It was held that the insurer is liable to the said extent (alone) and not to any sum exceeding the said amount (notwithstanding that there is a non-obstante clause in Sec. [163A\(1\)](#) of the Act). The Supreme Court in the said case (which came under Sec. [163A](#) of the Act) was upholding contention of the insurer that its liability under the contract of **insurance** was **limited** to ` 1,00,000/- meaning thereby that notwithstanding the non-obstante clause in Sec. [163A\(1\)](#) of the M.V. Act, the insurer was permitted to take up a defence available to it based on the contract of **insurance**.”

12) Incidentally, the learned Judge of Kerala High Court

discussed also the Gujarat High Court Judgment referred by learned Judge of this High Court. However, in view of aforementioned judgments of Apex Court he did not follow the same.

13) I have critically gone through the above judgment and I endorse the same view of learned Judge of the Kerala High Court. The non-obstante clause should be understood to be of limited purpose in excluding other provisions of MV Act and the provisions in other law in the matter of computation of compensation only and the said clause cannot be interpreted either to stunt or shut the defences available to Insurance Company under Section 149(2) of MV Act.

a) In my view, such an interpretation leads to disastrous results. For instance, it is a crystallised law that the liability of a gratuitous/unauthorised passenger in a goods vehicle will not be covered by section 147 of MV Act unless the owner pays extra premium for his coverage. If non-obstante clause of Section 163-A is interpreted to exclude the defences of Insurance Company, it will open the floodgates for all unauthorised/gratuitous passengers in goods vehicle to file claim petitions under Section 163-A and successfully thwart the attempts of Insurance Company to defend on the plea that their risk is not covered under the policy as no premium is paid.

b) Having regard to such ominous consequences befall and in view of clear finding of three Judges Bench of Apex Court in the case of **Swaran Singh** (9 supra) holding that the insurer is entitled to raise defence plea in terms of Section

149(2) of MV Act in a claim petition filed under Section 163A or Section 166 of the MV Act, I am not able to follow judgment of this High Court in ***Katikala Indira***'s case (2 supra).

So, point No.2 is concerned, it is held, in a claim petition filed under Section 163-A or 166 of MV Act the insurer is entitled to take defences available to it under Section 149(2) of MV Act.

14a) **POINT No.3**: To decide this point, the purpose for which the crime jeep was used and nature of the policy issued are relevant. A perusal of Ex.B1—policy shows that it is a liability only policy or Act policy and certificate of insurance was issued to use the vehicle as “***passengers carrying commercial vehicle***” with a seating capacity of five. Thus, it is evident that vehicle in question is a “*public service vehicle*” but not a *private vehicle* intended for exclusive use of the owner. A *public service vehicle* is defined under Section 2(35) of MV Act as follows:

“2(35) “public service vehicle” means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage;”

b) Then, coverage of risk of passengers for hire or reward in a public service vehicle is concerned, Section 147(1)(b)(ii) lays down that their risk must cover. Then, in the instant case the charge sheet and other record would show that deceased and others engaged the crime jeep for hire to go to Ongole to appear examination and on the way met with accident. Since the vehicle in question is a *public service vehicle* and

the deceased and others travelled in it as passengers for hire and as the policy was in force by the date of accident, the Insurance Company cannot take a plea that risk of deceased was not covered as no premium was paid for that purpose. It must be said that the risk of a passenger in a *public service vehicle* must be covered in terms of Section 147 of MV Act and the liability of Insurance Company is absolute to that extent. Therefore, the contention of Insurance Company cannot be accepted.

c) I happened to go through the Division Bench judgment of this Court in **Kondakotla Saroja**'s case (4 supra) to know whether it helps the contention of Insurance Company that the policy will not cover the risk of a passenger in the jeep. In that case the deceased travelled in a jeep, met with accident and died when the jeep turned turtle on the way. Against the claim petition, the Insurance Company took the plea that the policy issued was Act policy and the vehicle involved in the accident was hired to Eenadu daily newspaper against the policy condition and the deceased travelled in the said vehicle as an unauthorised passenger (fare paid passenger) in violation of the policy. In that context, the Division Bench examined Ex.A5 —policy and found that it was an Act only policy and columns “*additional risks if any covered*” and “*special conditions if any*” were kept blank indicating that no extra premium has been paid to cover the passengers travelled in the jeep and accordingly exonerated the Insurance Company. It must be noted that in that case the facts would show the jeep in question was a private vehicle unlike in the present case

where the jeep is *public service vehicle* and the said jeep was unauthorisedly hired to Eenadu daily newspaper against the policy conditions and further, the deceased travelled therein as an unauthorised fare paid passenger. It is clear that Section 147(2) of MV Act will not cover the risk of fare paid passengers/unauthorised passengers in a private vehicle unless extra premium is paid. So, by facts, the said decision can be distinguished.

d) Above all, the Insurance Company did not take any plea in its counter regarding non-coverage of policy to the deceased and it has not adduced any evidence to that effect. On that ground also it cannot now contend to exonerate it from its liability.

This point is thus answered against the Insurance Company.

15) Then, the next contention of Insurance Company is that Tribunal erred in taking the net annual income of the deceased as Rs.15,000/- instead of taking his gross annual income of Rs.15,000/- and deducting 1/3rd therefrom. The Tribunal has given cogent reason for taking the net annual income of the deceased as Rs.15,000/- and I see no reason to differ with it.

16) In the result, in view of the above findings, there are no merits in the appeal and accordingly, this MACMA filed by the Insurance Company is dismissed. No costs in the appeal.

As a sequel, miscellaneous petitions pending if any shall stand closed.

Date: 11.08.2015

Murthy

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- [\[1\]](#) 2009 ACJ 187 (AP)
 - [\[2\]](#) 2013 (6) ALD 89
 - [\[3\]](#) (2006) 4 SCC 404
 - [\[4\]](#) 2009 ACJ 1127 (AP) = MANU/AP/0233/2008
 - [\[5\]](#) 2007 ACJ 1235 (Gujarat) = MANU/GJ/8262/2006
 - [\[6\]](#) 2000 (1) LL.J. 1656 (SC) = MANU/SC/0312/2000
 - [\[7\]](#) 2014 ACJ 1 (Kerala) = MANU/KE/0641/2013
 - [\[8\]](#) 2012 ACJ 1 (SC) = MANU/SC/1374/2011
 - [\[9\]](#) AIR 2004 SC 1531 = MANU/SC/0021/2004
 - [\[10\]](#) 2004 (2) KLT 395 = MANU/SC/0246/2004
 - [\[11\]](#) (2008) 5 SCC 736 = MANU/SC/2091/2008