IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

****

M.A.C.M.A. No. 351 of 2009

Between:

National Insurance Company Limited rep. by

The Divisional Manager …. Appellant

And

Chikkam Pavan Kumar and others …. Respondents

DATE OF JUDGMENT PRONOUNCED: 31**.07.2015**

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 HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.No.351 of 2009

JUDGMENT:

Aggrieved by the Award dated 31.05.2008 in M.V.O.P.No.767 of 2004 passed by the Chairman, MACT-cum- District Judge, Vizianagaram (for short "the Tribunal"), the 4th respondent in the O.P/National Insurance Company Limited preferred the instant appeal.

2) The factual matrix of the case is thus:

a. The case of the claimant is that on 12.09.2003 when he along with his co-worker—Mutyala Siva Prasad was travelling in a Eicher Van bearing No.AP 5Y 1546 to distribute the fruits to various fruit vendors at Gajuwaka and Vizianagaram on the instructions of his employer and after unloading the stock at N.V.R.Fruits Shop, Vizianagaram and returning to Ravulapalem and when they reached near Allupeta junction at about 5.30 AM, the driver of the van drove the same in a rash and negligent manner and at high speed and dashed the road side palmyrah tree and thereby, the claimant sustained grievous injuries all over the body. It is averred that the accident was occurred due to the fault of driver of the van. On these pleas, the claimant filed M.V.O.P.No.767 of 2004 under Section 166 of Motor Vehicles Act (for short "MV Act") and claimed Rs.4,00,000/- as compensation against respondents 1 to 4, who are the driver, owner, insurers of the offending van.

b. Respondents 1 and 2 remained ex-parte.

c. Respondent No.3/ Oriental Insurance Company filed counter and denied all the averments made in the petition and urged to put the claimant in strict proof of the same. R3 disowned its liability on the ground that claimant was an unauthorized passenger and finally it contended that compensation claimed was highly excessive and exorbitant and thus prayed to dismiss the O.P.

d. Respondent No.4/National Insurance Company filed counter and contended that claimant travelled in the goods vehicle as an unauthorized passenger and therefore, he is not entitled for any compensation. Finally, it contended that unless it is proved by the claimant that driver has valid and effective driving licence at the time of accident, he is not entitled for any compensation.

e. During trial, PWs.1 to 2 were examined and Exs.A1 to A10 were marked on behalf of claimant. RW1 was examined and Exs.B1 and B2 were marked on behalf of respondents.

f. The Tribunal considering the oral and documentary evidence held that driver of the offending van was responsible for the accident. Compensation is concerned, the Tribunal awarded Rs.1,96,000/- with proportionate costs and interest at 6% p.a. under different heads as follows:

Loss of future earnings

due to 25% disability Rs. 67,500-00

For fractures injuries Rs. 75,000-00

Pain and suffering Rs. 10,000-00

Medical expenses Rs. 42,000-00

Transport and extra-nourishment Rs. 2,000-00

Total: Rs. 1,96,500-00

Rounded off to Rs.1,96,000/-

Hence, the appeal by National Insurance Company Limited.

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

4) Heard arguments of Sri S.Agasthya Sharma, learned counsel for appellant/Insurance Company, Sri S.Sudarshan, learned counsel for R1/claimant, Sri Jayanthi S.C.Sekhar, learned counsel for R3/owner and Sri P.Harinath Gupta, learned counsel for R4/Orieintal Insurance Company.

5) Learned counsel for appellant/Insurance Company impugned the award of the Tribunal mainly on the contention that the Tribunal on one hand agreeing with the contention of the Insurance Company that the claimant travelled in the crime vehicle as an unauthorised passenger and his risk was not covered under the terms of Ex.B1—policy, however, erroneously directed the appellant/Insurance Company to pay compensation initially and then recover from the insured/owner. Learned counsel vehemently argued that when the policy do not cover the risk of a particular person, the question of ordering to pay compensation to him and then recover from insured does not arise. Since in this case claimant was held by the Tribunal as unauthorised passenger, the policy will not cover his risk. That being so, the further question of directing the Insurance Company to pay and recover also does not arise. To buttress his contention learned counsel relied upon the decision of the Madras High Court reported in ***United India Insurance Company Limited v. M.Thangavel, K.S.Kumar***. He thus prayed to exonerate the Insurance Company from its liability.

6) Per contra, learned counsel for R3/owner of the vehicle argued that claimant travelled not as an unauthorised/gratuitous passenger but in the capacity of authorised agent of his owner to unload the fruit

baskets at different locations and therefore, he must be held as either authorised representative of the owner of the goods or loading and unloading coolie. In either case, the policy invariably covers the risk of the claimant. He vehemently argued that Tribunal on an erroneous view held as if claimant was an unauthorised passenger and directed the Insurance Company to pay and recover the compensation. In fact, it ought to have fastened the entire liability on the Insurance Company instead of ordering pay and recover since the policy was in force.

7) Learned counsel for R1/claimant adopted the arguments of learned counsel for R3/owner.

8) In the light of above rival arguments, the points for determination in this appeal are:

> *1) Whether the claimant travelled as unauthorised passenger in the goods vehicle or as an authorised representative of the owner of the goods?*
>
> *2) In either case as above, whether policy covers the risk of the claimant?*
>
> *3) Whether the award of the Tribunal insofar as directing the appellant/Insurance Company to pay and recover the compensation from the insured is factually and legally correct?*
>
> *4) To what relief?*

9 a) **POINT No.1**: The case of the claimant, as can be seen from Ex.A1—FIR which was registered on the strength of his statement recorded within short time of the accident, was that the claimant was a resident of Amalapuram and was working as a clerk under fruit merchant—Nimmala Vykuntam and on the morning of 12.09.2003, his owner instructed him and his co-worker—Mutyala Siva Prasad to go to Ravulapalem where a van bearing No. AP 5Y 1546 with a load of grapes would come from Bangalore and both of them should go in that van to Gajuwaka and Vizianagaram to distribute the fruits and return. Accordingly, they proceeded in Eicher van and delivered the grapes to the fruit vendors at Gajuwaka and Vizianagaram and while returning the accident was occurred. It is true that claimant has not

examined his owner to prove his employment. However, as stated supra, the contents in FIR which were noted at the earliest point of time would show that claimant travelled as authorised representative of goods. The contents therein cannot be said to be manipulated since they were recorded at the earliest point of time and hence can be believed.

b) That being so, by all means, it can be said that claimant was not an unauthorised passenger but travelled as an authorised representative of the fruits belonging to his master. Unfortunately the Tribunal has not considered this fact properly.

Point No.1 is answered accordingly.

10 a) **POINT No.2**: This point is concerned, under Section 147 of M.V. Act when a policy is issued in respect of goods vehicle, it must invariably cover the risk of owner of the goods or his authorised representative. Since it is held that claimant travelled in the capacity of authorised representative of his master, Ex.B1—policy shall invariably cover his risk.

b) Since the contention of the appellant/Insurance Company that the claimant travelled as an unauthorised passenger is rejected, his further contention Ex.B1—policy do not cover his risk is also liable to be rejected. The cited decision (1 supra) will not come to the aid of the Insurance Company. The facts in that case relates to an unauthorised passenger who travelled in a goods vehicle i.e. lorry. In that context, Honourable Madras High Court has observed that the doctrine of "*pay and recover*" will not be applicable to the cases where there is no statutory liability to pay compensation to the victim who was an unauthorised passenger.

However, in the instant case, the claimant being the authorised representative of the owner of the goods, the above decision has no application.

Point No.2 is answered accordingly.

11) **<u>POINT No.3</u>**: In view of findings on points 1 and 2, the Tribunal's direction to the Insurance Company, *pay and recover* cannot be appreciated and in the normal course, the full liability has to be fastened on the Insurance Company. However, it must be noted that in this case the owner/ the insured has not filed any appeal challenging the award. It is only the Insurance Company which preferred the instant appeal questioning the Tribunal's direction of pay and recover. In these circumstances, though Insurance Company is liable to be fastened with entire liability that cannot be done. Therefore, the Tribunal's direction to the Insurance Company to pay and recover from the insured is kept in tact.

12) In the result, this MACMA filed by the appellant/Insurance Company is dismissed by confirming the award passed by the Tribunal in O.P.No.767 of 2004. No costs in the appeal.

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

U.DURGA PRASAD RAO, J

Date: 31.07.2015

Murthy