HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A. NO. 1279 OF 2009

JUDGMENT:

Challenging the Award dated 26.02.2007 in M.A.T.O.P.No. 1258 of 2005 passed by the Chairman, MACT-cum-IV Additional District Judge, FTC-III, Khammam, (for short "the Tribunal"), the second respondent-Insurance Company preferred the instant MACMA.

2a) The factual matrix of the case is thus:

On 1.11.2005 at about 19.00 when the claimant and others were travelling in an auto bearing No. AP 20 W 4316 between Rompedu and Yellandu and when the Auto reached near Kathi Ramaiah Gumpu at the outskirts of Rompedu, another auto bearing No. AP 20 W 2809 came in an opposite direction being driven by its driver in a rash and negligent manner and dashed the claimant's auto and thus caused an accident. In the result of which, the claimant and others suffered injuries and the claimant was concerned, his right leg above the knee amputated and thus he suffered permanent disability. It is averred that the accident was occurred due to the sole fault of the driver of the offending auto bearing No. AP 20 W 2809. On these pleas, the claimant filed MATOP No. 1258 of 2005 under Section 166 of Motor Vehicles Act and claimed Rs. 3,50,000/- as compensation under different heads as mentioned in OP against respondents 1 and 2, who are the owner and insurer of auto bearing No. AP 20 W 2809.

b) First respondent remained *ex parte*.

c) Second respondent/Insurance Company filed counter and opposed the claim denying all the material averments made in the petition and urged the Tribunal to put the claimant in strict proof.

d) During trial, PWs.1 and 2 were examined and Exs.A-1 to A-11 were marked on behalf of claimant. RW-1 was examined and Ex.B-1 was marked on behalf of the second respondent.

3. The Tribunal on appreciation of facts and evidence awarded Rs. 1,71,000/- with costs and interest at 7.5% per annum from the date of OP till the date of realisation. So far as the liability is concerned, the first respondent being the owner of the offending auto, the Tribunal fastened the liability on him and the Insurance Company is concerned, the Tribunal in paragraph 7 of its award has observed that the driver had no driving licence and the fist respondent having knowledge about this fact did not contest the matter and thus there was violation of terms of policy. On this observation, the Tribunal at the end of paragraph 7 of the award made it clear that the second respondent-Insurance Company shall pay the compensation amount and recover the same from the first respondent, who is the owner of the auto. In the

operative portion of the award, however, the Tribunal mentioned as if the respondents 1 and 2 are jointly and severally liable to pay the compensation and it did not specify that the second respondent-Insurance Company can, after paying the compensation, recover the same from the first respondent.

4. Hence, the instant MACMA by the Insurance Company.

5. Heard the arguments of learned counsel for the appellant Sri N. Mohan Krishna. Though first respondent-claimant was represented by his advocate Sri Y. Ramesh, he has not appeared and submitted his arguments. Respondent No. 2/Insured served but there was no representation.

6. Learned counsel for the appellant submitted that the driver of the offending auto had no valid driving licence and owner of the vehicle intentionally allowed him to drive the vehicle and therefore, they have committed the breach of terms of the policy and as such the Tribunal ought to have exonerated the Insurance Company from its liability for violation of the terms of the policy but the Tribunal erroneously directed the Insurance Company to pay and recover the compensation. He thus prayed to allow the appeal and exonerate the Insurance Company from its liability. Alternatively, the learned counsel argued that if his

argument is not appreciated, the ‘pay and recover’ direction may be incorporated in the decree for clarity sake.

7. In the light of the above arguments, the point for consideration in this appeal is:

“Whether the Tribunal was right in fastening liability on the appellant/Insurance Company?

8. **POINT**: As seen from the record, the driver of the auto bearing No. AP 20 W 2809 has no valid driving licence and it appears under Ex. A2 charge sheet, he was charged for the offence under Section 181 of Motor Vehicles Act. Therefore, there is a violation of terms of policy. However, by that count alone, the Insurance Company cannot be exonerated from its liability as per principles laid down by the Supreme Court in ***National Insurance Co. Ltd. v. Swaran Singh***[1]***.***

9. In the said case, Hon’ble Apex Court was dealing with wide spectrum of defence pleas of Insurance Companies basing on the deficiencies in driving licences. Such deficiencies are:

a) Fake driving licenses of the driver.

b) Driver not having licence whatsoever.

c) No renewal of driving licence as on the date of accident.

d) License granted for one class or description of vehicle but vehicle involved in accident was of different class or description.

e) Driver holding only a learner’s licence.

The Apex Court after discussing various issues involved in this regard, summarized its findings thus:

i) Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

ii) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

iii) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid license by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

iv) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

v) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal.

10) From the above summarization, it is clear that an Insurance Company in order to succeed in its defence pleas touching the driving licence issues must:

a) Firstly establish that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to driving at the relevant time.

b) Secondly, the breach, which was committed by the insured, was so fundamental as is found to have contributed to the cause of the accident.

Even upon establishing the above conditions by the Insurance Company, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts, which it has been compelled to pay to the third party under the award of the Tribunal.

11. Therefore, in view of the above, it is not sufficient for the Insurance Company to prove that the driver of the offending vehicle had no valid driving licence to absolve its liability. It has to further establish that the owner of the vehicle had intentionally allowed the un-licensed driver to drive the vehicle, thus caused the breach of terms of the policy and further the said violation was the fundamental cause for the accident. In this case, the Insurance Company could only establish that the driver of the offending auto had no valid licence. It failed to prove the other aspects. Therefore, the Tribunal was right in directing the Insurance Company to pay at first and recover from the Insured. However, the Tribunal has not incorporated this condition in the operative portion of the decree and so that condition needs to be incorporated in the operative portion of the

award and decree. To this extent alone the award of the Tribunal can be corrected.

12. In the result, this MACMA is partly allowed and directed that the appellant/Insurance Company shall pay the compensation awarded by the Tribunal with costs and interest and later recover the same from the Insured. The Insurance Company shall deposit the compensation amount within two months from the date of receipt of a copy of this decree. There shall be no order as to costs.

13. As a sequel thereto, miscellaneous applications, pending if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 10.07.2015
KA

[1] ***AIR 2004 SC 1531***