HON'BLE SMT JUSTICE ANIS

CIVIL MISCELLANEOUS APPEAL No.4702 of 2004

J U D G M E N T:

This appeal is filed by the appellant/third respondent under Section 173 of the Motor Vehicles Act, 1988 (for short 'the Act'), aggrieved by the order dated 24.06.2004, passed by the Chairman, Motor Vehicle Accident Claims Tribunal-cum-
VI Additional District Judge, Visakhapatnam, in M.O.P.No.2076 of 1999, awarding compensation of Rs.2,90,000/-.

2. The respondent No.1/petitioner filed the above M.O.P under Section 166 of the Act read with Rule 455 of the Andhra Pradesh Motor Vehicle Rules, 1989, (for short 'the Rules'), claiming compensation of Rs.8,38,135-91ps on account of the injuries received by him in a motor vehicle accident, that occurred on 28/29.04.1999.

3. For the sake of convenience, the parties hereinafter will be referred to as they are arrayed in the Original Petition.

4. The brief averments made in the petition are that on the intervening night of 28/29.04.1999 at about 12:00 mid night, while the petitioner was proceeding in the lorry bearing No.5.T.1681 along with Cashew bags to go to Nakkapalli from Tuni, when the lorry reached near Chirika Kothuru village, the driver of the lorry drove the vehicle in a rash and negligent manner and dashed to a trailor lorry bearing No.AP.11.T.3334, which was stopped by the road side. In the accident, petitioner sustained crush injury to his left leg, which was amputated subsequently at K.G. Hospital, Visakhapatnam. There, he underwent treatment as inpatient from 29.04.1999 to 19.06.1999 and after his discharge from the said hospital he was taken to a private nursing home by name 'Venkata Ramana Hospital'. Before the accident, he worked as Commission

agent to Life Insurance Corporation and he was paid Rs.25,903-90ps per year and he was also paid Rs.40,000/- by Varalakhsmi Traders, Tuni, towards sale price of cashew nuts. Because of the crush injury to his left leg, he is unable to move and is not in a position to do the business. Therefore, prayed the Court to grant compensation against all the respondents.

5. Before the Tribunal, first respondent remained ex parte, while the second respondent has not filed any counter.

6. The brief averments made in the counter filed by the third respondent are as follows:

The third respondent put the petitioner to prove the manner of accident, age and income of the petitioner and treatment taken by him in various hospitals by spending huge amounts. The third respondent specifically stated that the petitioner boarded the lorry as a gratuitous passenger and therefore, Insurance Company is not liable to pay any compensation to the petitioner and finally prayed the Court to dismiss the petition.

7. Basing on the above pleadings, the Tribunal framed three issues and to substantiate the claim, the petitioner got examined PWs.1 to 3 and got marked Exs.A1 to A9 on his behalf. On behalf of the contesting respondent, RW.1 was examined and Ex.B1 got marked.

8. After considering the oral and documentary evidence, the Tribunal held that the accident occurred due to rash and negligent driving of the lorry bearing No.5T.1681 and awarded compensation of Rs.2,90,000/- along with interest at 9%p.a to the petitioner against respondent Nos.2 & 3.

9. Aggrieved by the order passed by the Tribunal, the third respondent preferred the present appeal.

10. The learned counsel appearing for the appellant/third respondent argued that the petitioner is not the owner of the goods and he is a midway passenger and entire lorry was not booked by the petitioner to transport cashew nuts; that the cashew bags alleged to be carried by the petitioner is his own personal luggage, therefore, petitioner is a gratuitous passenger and relied upon the case laws reported in

(1) ***Muram Mohan v. Gundumogula Venkata Rama Rao and another***[1], wherein it is held at para 17 as follows:

> *"17. Therefore, by no stretch of imagination, it can be said that the provisions of Motor Vehicles Act more so Section 147 of the Act can be invoked to hold that the claimant was the owner of the goods and that he hired the vehicle for the purpose of transporting the goods. From the facts and circumstances of the case, the inevitable conclusion would be that the claimant was travelling in the said vehicle as gratuitous passenger and the insurer is not liable to pay any compensation."*

(2) ***National Insurance Co. Ltd., Vijayawada v. Kunam Dhana Lakshmi and others***[2]***,*** wherein it is held at paras 7 & 13 as follows:

> *"7. Even in the claim application, it is averred that on that day the deceased boarded the lorry at Ongole to go to Kavali. Admittedly, the deceased was not accompanying any goods in the said vehicle. He was only a midway passenger, who boarded the lorry at Ongole to get down at Kavali. In Ex.A1-First Information Report; EX.A2-inquest report and Ex.A4-charge sheet also, it is stated that the deceased boarded the lorry as a passenger. As seen from the charge sheet, the lorry was proceeding from Vijayawada to Bangalore with plywood and some agricultural plastic pipes and the deceased boarded the vehicle as a midway passenger to travel from Ongole to Kavali. Admittedly, the policy-Ex.B1 does not cover the risk of any passenger in a goods vehicle. The lorry is admittedly a non-transport goods vehicle and the deceased was travelling as an unauthorized passenger, whose risk is not covered by the policy-Ex.B1.*
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> *13. In view of the principles laid down in the above decisions and in view of the fact that the*

deceased was admittedly unauthorized gratuitous passenger travelling in a goods vehicle, whose risk is not covered by the policy-Ex.B1, the impugned award, fastening the liability on the appellant-insurer, is held unsustainable and the same is accordingly set aside insofar as the appellant-insurer is concerned. Claimants are however at liberty to recover the compensation amount awarded by the Tribunal from the owner of the vehicle. Appellant-insurer is entitled for refund of the amount deposited by them in pursuance of the interim order, dated 04.02.2011."

(3) ***United India Insurance Co. Ltd., Warangal v. Changanti Ramesh and others*** [3], wherein it is held at paras 5 & 6 as follows:

"5. The contention of the counsel for the appellant is that carrying of the soda gas cylinder and explosion of the same has nothing to do with the use of the vehicle and consequently the risk is not covered under the policy. However, this contention may not hold good for the reason if the vehicle was in use and if the driver of the vehicle has allowed some unauthorised material to be carried, then the cause of the accident is a case of negligence. But, however, it is also the further contention of the counsel for the appellant that the vehicle was not in use. Further, even assuming to be that the vehicle is to be taken as in use being parked while it was going from one place to another, the person who received the injuries has entered into the vehicle unauthorisedly and his entrance is only a gratuitous unauthorised passenger. If at all it is to be accepted and consequently the vehicle being a goods vehicle there is no liability for the appellant. The above contention of the counsel for the appellant holds good in view of the fact that in a goods vehicle whether it is in movement or otherwise, if the Insurance Company is to be made liable there cannot be any unauthorised travel and gratuitous passengers are not covered under the risk.

6. Therefore, in view of the above circumstances, the liability of the Insurance Company is exonerated and the appeal is liable to be allowed. However, if the amount deposited by the appellant is withdrawn, the appellant is at liberty recover the same from the owner of the vehicle and if the amount deposited is not withdrawn, the appellant is entitled to claim the same and the claimant/petitioner is to proceed for realisation against the owner of the vehicle."

(4) ***United India Insurance Co. Ltd., Suryapet Town, Nalgonda District v. Madavarapu Anil and another*** [4]***,*** wherein it is held at

paras 11 to 15 as follows:

> *"11. In New India Assurance Co., Ltd, v. Asha Rani, 2003 (1) ALD 18 (SC) = 2003 ACJ 1 (SC), the apex Court held as follows:*
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> > *"... Keeping in view the provisions of 1988 Act, it can be said that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in the goods vehicle, the insurer would not be liable therefor.*
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> > *.... An owner of a passenger carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability as provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid."*
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> *It was further held as follows:*
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> > *"It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people."*
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> *12. In National Insurance Co. Ltd. v. Bommithi Subbayamma and others, 2005 (2) ACJ 721 (SC), it was held as follows:*
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> > *"Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people."*
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> *13. In New India Assurance Co. Ltd., v. Rattani and others, 1 (2009) ACC 422, it was held as follows:*
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> > *"We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the*

truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants."

14. In New India Assurance Co. Ltd., v. Vedwati and others, 2007 (1) DT 387 (SC), the apex Court held as follows:

"The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor."

15. In view of the well settled principle of law laid down in the above decisions and the claimant in the present case being admittedly a gratuitous passenger in a goods vehicle whose risk is not covered by the policy, it is held that no liability can be fastened on the appellant-insurer to pay the compensation. Claimant is however entitled to recover the amount awarded by the Tribunal from the owner of the vehicle. The impugned order is accordingly modified. Appellant-insurer is entitled to have refund of the amount deposited by them into the Court in pursuance of the interim order, dated 29.12.2008, in CRPMP No. 8745 of 2008, if any, already withdrawn."

(5) ***National Insurance Co. Ltd., Vijayawada v. Gundavarapu Nirmala and others***[5]***,*** wherein it is held at para 13 as follows:

"13. In view of the principles laid down in the above decisions and in view of the fact that the deceased was admittedly unauthorized gratuitous passenger travelling in a goods vehicle, whose risk is not covered by the policy-Ex. B1, the impugned award, fastening the liability on the appellant-insurer, is held unsustainable and the same is accordingly set aside insofar as the appellant-insurer is concerned. Claimants are however at liberty to recover the compensation amount awarded by the Tribunal from the owner of the vehicle. Appellant-insurer is entitled for refund of the amount deposited by them in pursuance of the interim order, dated 04.02.2011."

(6) ***New India Assurance Co. Ltd., v. Asha Rani and others***[6]***,*** wherein it is held at para 10 as follows:

"10. In Satpal's case [(2001) 1 SCC 237] the Court assumed that the provisions of Section 95(1) of Motor Vehicles Act 1939 are identical with Section 147(1) of the Motor Vehicles Act 1988, as it stood prior to its amendment. But a careful scrutiny of the provisions would make it clear that prior to the amendment of 1994 it was not necessary for the

insurer to insure against the owner of the goods of his authorised representative being carried in a goods vehicle. On an erroneous impression this Court came to the conclusion that the insurer would be liable to pay compensation in respect of the death or bodily injury caused to either the owner of the goods or his authorised representative when being carried in a goods vehicle the accident occurred.

…… On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury. The judgment of this Court in Satpal's case, therefore must be held to have not been correctly decided and the impugned judgment of the Tribunal as well as that of the High Court accordingly are set aside and these appeals are allowed. It is held that the insurer will not be liable for paying compensation to the owner of goods or his authorised representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of goods or his representative dies or suffers any bodily injury."

The learned counsel for the appellant/third respondent also argued that the petitioner has not booked the entire lorry for transporting goods and he did not produce any lorry receipt or any way bill relating to the goods booked by him. Therefore, the petitioner is a gratuitous and unauthorized passenger travelling with his personal goods and he cannot be called as owner of the goods and prayed the Court to allow the appeal.

11. On the other hand, the learned counsel for the first respondent/petitioner argued that the petitioner is not the unauthorized passenger, but he is travelling in the vehicle as owner of the goods and the case laws relied upon by the appellant are no way relevant to the facts of the case, petitioner is not a midway passenger and relied upon the case laws reported in (1) ***Manager, National Insurance Co. Ltd., v. Saju P. Paul and another***[7], wherein it is held at paras 24 & 25 as follows:

"24. In National Insurance Co. Ltd. v. Parvathneni

and Anr. [SLP (C) ... CC No. 10993 of 2009], the following two questions have been referred to the larger Bench for consideration:

> "*(1) If an Insurance Company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.*
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> *(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142? Does Article 142 permit the Court to create a liability where there is none?"*

25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur's case [(2004) 2 SCC 1] and Challa Bharathamma's case [(2004) 8 SCC 517] should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (Appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of Challa Bharathamma's case (supra)."

(2) ***Branch Manager, United India Insurance Co. Ltd. Dabagardens, Visakhapatnam v. Dadisetti Ramanamma and others***[8], wherein it is held at paras 22, 23 & 24 as follows:

"22. Reliance General Insurance Company Limited, Hyderabad Vs. Mohd. Saleem and Another [2013 (3) ALD 246] is a case of unauthorized person traveling in a goods vehicle. Insurance company is held not liable to pay compensation. However, the

claims Tribunal directed the insurance company to pay the compensation in the first instance and then recover from the owner. Aggrieved thereby, insurance company filed the appeal. Following the decisions of Hon'ble Supreme Court in the case of Baljith Kaur, Kusum Lata and Kamala this Court upheld the direction issued by the Claims Tribunal. This Court held that by virtue of the power vested in the Tribunal under Section 168 of the Act, the Tribunal is competent to issue direction to the insurer to satisfy the award in the first instance in favour of the victims/third parties and recover the amounts so paid from the insured. The learned single Judge followed earlier decision of Division Bench in MACAM No. 2535 and 1661 of 2006.

23. In the case of New India Assurance Company Limited, Khammam Vs. Karam Dhanalakshmi and Others 2013(3) ALD 124, though learned Tribunal held that insurance company is not liable to pay compensation, directed the insurance company to pay the compensation and to recover from the owner. This is challenged by the insurance company. The direction of the claims Tribunal is upheld. This court held as under:

> *"7. Before parting with this Judgment, I consider it just and reasonable to observe as follows:*
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> *As when accident occurs, the concerned police officials and the Road Transport Authority officials should inform the insurance companies with which the vehicle or the vehicles involved in the accident are insured. Then, the insurance companies must verify whether there are any violations of conditions of policy. If, in the opinion of the insurance company, there are violations of the terms and conditions of the insurance policy, the insurance companies must take steps to see that the vehicle or vehicles involved in the accident or the properties of the insured sufficient to enable the Insurance Companies to recover the amount of compensation that may be approximately awarded to the claimants should be attached. All such steps have to be taken at the initial stage itself. Admittedly, no such steps were taken by the Insurance Company till this date, therefore, at this stage, it may not be just and reasonable to issue directions as prayed by the learned counsel for the appellant. It is made it clear that the insurance company is at liberty to initiate proceedings before the concerned Executing Court as if the dispute between the insurer and the owner was subject matter of determination before the Tribunal and the issue is decided*

against the owner in favour of the insurer. The insurance company may take all steps necessary to recover the amount from the insured, but release of the amount in favour of the claimants cannot be stopped in the interest of justice, because the accident in this case occurred on 19.4.2008 and the first claimant was aged about 23 years the 2nd claimant was aged about one year, the third claimant was aged about 60 years and the 4th claimant is aged about 58 years on the date of filing of the claim petition and there is no possibility to dispose of the appeal in near future since MACMAs of the year 2000-2001 are still pending. Therefore, it is not desirable to accept the request of the learned counsel for the appellant. Therefore, the appellant is directed to comply with the award passed by the Tribunal within three months from the date of receipt of a copy of this order. On deposit of such amount, the claimants are permitted to withdraw the same with accrued interest thereon."

24. In the cases on hand the accident occurred on 9.11.1999 resulting in death of persons whose dependants instituted these four Original Petitions. The awards were passed on 25.4.2003. So far only 50 % of the compensation awarded is deposited. Learned counsels are not clear whether claimants have withdrawn the said amount. They are already caught in the cross fire due to the litigation anxiously waiting endlessly for the compensation amount which they need desperately. Thus, at this stage, if the direction of Claims Tribunal is upset, the claimants would be left in the lurch. They have to undergo rigmarole to get their compensation from the owner. It would, thus, be unjust to put these hapless claimants to such rigors at this stage. Granting relief in favour of appellant would result in greater injustice to claimants. On the contrary insurance company is not subjected to any loss. The liability to pay compensation by owner remains. The appellant is required to take steps to recover from owner.

and prayed the Court to dismiss the appeal.

12. Having regard to the submissions made by the learned counsel appearing for both parties, the point which is to be decided in this appeal is as follows:

Whether the appellant/third respondent is entitled to set aside the order dated 24.06.204, passed by the

Tribunal or not?

13. **POINT:** After perusing the evidence of PWs.1 & 3, the Tribunal held that the accident was occurred due to rash and negligent driving of the driver of the lorry bearing registration No.5T.1681, in which the petitioner received grievous injuries on the intervening night of 28/29.04.1999 and awarded compensation of Rs.2,90,000/- along with 9% interest.

14. The main defence of the appellant/third respondent is that the petitioner is an unauthorized passenger travelling in a goods vehicle. Further, he is a midway passenger and therefore, the Insurance Company is not liable to pay compensation.

15. PW.1 in his evidence stated that on the date of accident, he was travelling in the lorry from Tuni toYellamanchili and he has boarded the lorry along with Cashew bags and when the lorry reached near Chirika Kothuru village, the driver of the lorry dashed the stationed lorry due to which he received injuries. In the cross-examination, PW.1 admitted that he boarded the lorry at about 10:00 p.m and the accident was taken place on 10:30 p.m; that there were even other persons travelling in the lorry and he was sitting beside the cleaner of the lorry; that he did not give any complaint to the police after the accident and also stated that he paid Rs.60/- towards the fare of goods and Rs.15/- towards his fair to the driver of the lorry and the driver of the lorry had not issued any receipt to him. PW.3 in his evidence stated that on the date of accident, he went to Annavaram to attend the marriage of his paternal junior uncle’s daughter, and when they were returning back they boarded the lorry at Annavaram and when the lorry reached near Tuni, PW.1 boarded the lorry with cashew bags. Petitioner sat in the cabin of the lorry and thereafter, when the lorry reached Chiraka Kothuru village, the accident occurred. According to him,

five persons were travelling in the said lorry including him.

16. A perusal of the evidence of PWs.1 & 3 clearly established that petitioner has not taken the entire lorry for transportation of cashew bags. Even in the copy of the First Information Report, it is nowhere mentioned that the petitioner boarded the lorry with cashew bags. Likewise, the petitioner also not filed any charge sheet showing that the Investigating Officer investigated the case to show that petitioner is the owner of the goods at the time of accident. Therefore, the petitioner is a midway passenger and the petitioner has not filed any documentary evidence to show that the entire lorry was booked for transportation of goods and also no receipt is filed. Therefore, from the facts and circumstances of the case, it is inevitable to conclude that the petitioner was travelling in the goods vehicle as a gratuitous passenger. Therefore the appellant Insurance Company is not liable to pay any compensation to the petitioner.

17. Admittedly, the accident was occurred on 28/29.04.1999 resulting in grievous injuries to the petitioner and his left leg was amputated. The award was passed on 24.06.2004 and as per the directions of this Court, the Insurance Company was directed to deposit half of the compensation with proportionate interest and proportionate costs and granted stay to the Insurance Company. This Court also permitted the petitioner to withdraw the said amount without furnishing any security.

18. I n **National Insurance Co. Ltd., v. Baljit Kaur and others**[9]**.** the Hon'ble Apex Court held at paras 20 & 21 as follows:

> *"20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would*

now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the tact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (2001) 1 SCC 237]. The said decision has been overruled only in Asha Rani 2003 (1) ALD 18 (SC). We, therefore, are of the opinion that the interest of justice will be subserved if the appellant, herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the tribunal in such a proceeding."

19. Therefore, in view of the above discussion and in view of the ratio laid down in the Baljit Kaur's case (ninth cited supra), this Court is of the view that the appellant/Insurance Company is not liable to pay any compensation to the first respondent/petitioner, but direct the appellant/Insurance Company to first satisfy the awarded amount and recover the same from the owner of the vehicle by initiating a proceeding before the executing Court without filing a separate suit, as the accident taken place in 1999 i.e., fifteen years

back.

20. Accordingly, the Appeal is disposed of. No order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

ANIS, J

Date: 20.01.2015
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[1] 2013 (1) ALD 41
[2] 2012 (5) ALD 117
[3] 2013 (3) ALD 515
[4] 2012 (4) ALD 482
[5] 2013 (3) ALD 685
[6] 2003 (1) ALD 18 (SC)
[7] 2013 (2) ALD 95 (SC)
[8] 2013 (5) ALD 504
[9] 2004 (1) SCALE 124