HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

<u>C.M.A No.999 of 2004</u>

JUDGMENT:

The 2nd respondent-insurer, among two respondents including the owner of the tipper bearing No.ABT 7011, filed the appeal impugning the award of the Tribunal in O.P. No.151 of 2000 dated 18.02.2002 in the claim maintained by the injured-claimant for the injuries sustained in the accident dated 25.11.1999 while he was traveling in the tipper bearing No.ABT 7011 as loading and unloading labourer, in the way from Goulidoddi to Rayadurgam the accident occurred and claimed compensation under Section 166 of the Motor Vehicles Act for Rs.3,00,000/- and the Tribunal since awarded Rs.3,00,000/- with interest at 9% p.a. by fixing joint liability in impugning the same.

2) The contentions in the grounds of appeal are that the Tribunal ought to have been restricted under the Workmen Compensation Act, the policy issued by the 2nd respondent insuring the vehicle of the 1st respondent is only an Act policy, the claim of he was earning Rs.2,000/- per month is baseless, Tribunal ought to have been apportioned the liability against the driver, owner and insurer of the two tippers respectively and could not have been fixed responsibility on the driver of the vehicle of the

1st respondent-insured with 2nd respondent of the claim petition and hence to set aside the award for no rash and negligent driving on the part of the driver of the tipper of the 1st respondent-insured with the 2nd respondent.

3) Learned counsel for the insurer-appellant reiterated the same. Whereas, it is the contention of the learned counsel for the claimant-respondent No.1 of the appeal that the award of the Tribunal holds good and for this Court while sitting in appeal, there is nothing interfere hence to dismiss the appeal.

4) Heard both sides and perused the material on record.

5) The fact that the injured-claimant was traveling in the tipper of the 1st respondent as a labourer from his claim not in dispute by the insurer, but for avoiding liability claiming exoneration from the policy is an Act policy and no way covered a labourer for loading and unloading for not even a case of owner or attender or representative of goods to cover under Act Policy under Section 147 of the Motor Vehicles Act as laid down in ***National Insurance Company Limited V. Prem Bhai Patel***[1]. A perusal of Ex.B-1 policy, clearly speaks that it is only an Act policy. If at all there is any liability that can be fastened on the 1st respondent, the question of indemnifying the 1st

respondent by the 2nd respondent arises even the other vehicle contributed to the accident, if any, not impleaded, by left open for one of the joint tort feasers impleaded to recover against the other on payment by stepping into the shoes here does not even that contingency from the material on record.

6) Having regard to the above, the fixing of liability on the insurer to indemnify against the owner for risk not covered under the policy is unsustainable and is liable to be set aside. However, it is left open to the claimant to make any claim if at all shown the other vehicle is also responsible for the accident independently. This observation no way influence but for deciding in such an event on own merits.

7) It is needless to say half of the amount is directed to be deposited while granting interim stay vide order dated 20.08.2002 and with permission to withdraw without furnishing security by the claimant. As laid down by the Supreme Court in ***United India Insurance Co. Ltd. V. Lakshmamma***[2], whatever the amount deposited and permitted to withdraw the insurer cannot recover from the claimant, but for from the 1st respondent and whatever amount deposited and not permitted to withdraw, if any, the insurer is entitled to take back by filing cheque petition by virtue of this order. So far as interest is concerned, what the Tribunal awarded of 9% p.a. as rightly contended

by the learned counsel for the appellant-insurer is exhorbitant to reduce to 7.5%.

8) Accordingly and in the result, the appeal is partly allowed to the extent of exonerating the liability of the insurer by fixing liability on the owner of the vehicle, for the Act policy not covered the risk to indemnify, and by reducing the rate of interest even against the owner-1st respondent to the claim petition from 9% p.a. to 7.5% p.a. However, by making clear that whatever the amount deposited by the appellant-insurer and permitted to withdraw by the claimant, the insurer cannot recover back from the claimant but from the 1st respondent owner of the vehicle and whatever the amount deposited lying with the Court deposit and not withdrawn by the claimant, without permission, the insurer is entitled to withdraw. No order as to costs.

9) Miscellaneous petitions, if any pending, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

20.07.2016
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[1] (2005)6 SCC 172
[2] (2012)5 SCC 234