HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

<u>M.A.C.M.A. No.3917 of 2009</u>

<u>JUDGMENT:</u>

Aggrieved by the Award dated 07.02.2008 in MVOP.No.483 of 2004 passed by the Chairman, M.A.C.T-cum-VI Additional District Judge (Fast Track Court), Tirupathi, (for short 'the Tribunal'), the second respondent/Insurance company in the OP, preferred the instant appeal.

2) The factual matrix of the case is thus:

a) On 28.11.2000 at 6.30 the claimant was travelling in the lorry bearing No. AAC 8739 as a coolie for loading and unloading sand and bricks etc., and on the way the lorry was driven by its driver in a rash and negligent manner with high speed and dashed against 3 pilgrims and as a result, the claimant fell down from the lorry and sustained fracture to his right foot and also injury to his right ankle joint. It is averred that the accident was occurred due to fault of the driver of the lorry. On these pleas, the claimant filed M.V.O.P.No.483 of 2004 under Section 166 of Motor Vehicles Act, 1988 (for short "the Act") against respondents 1 and 2 who are owner and insurer of the offending lorry and claimed Rs.1,00,000/- as compensation.

b) R1/owner remained *ex-parte*.

c) The 2nd respondent/Insurance Company filed written statement denying that the accident was occurred due to rash and negligent driving by the driver of the lorry. It further contended that the claimant traveled in the lorry as an unauthorized passenger and even if the claimant is held to be a coolie, the risk of coolies was not covered as no additional amount was paid to cover the risk of coolies and hence, it is not liable to pay any amount. It finally contended that the compensation claimed is excessive and exorbitant and thus prayed to dismiss the O.P

d) During trial, PWs.1 to 3 were examined and Exs.A1 to A5 were marked on behalf of claimant. On behalf of respondents, RW.1 was examined and Ex.B1 to B.4 were marked.

e) The lower Tribunal on appreciation of both oral and documentary evidence, held that accident was occurred on account of rash and negligent driving of the lorry driver and awarded compensation of Rs.61,000/- with proportionate costs and interest @ 7.5% p.a. against 1st respondent, directed 2nd respondent to pay compensation at first and recover from the R.1—Insured.

Hence, the appeal by the Appellant/insurance company.

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

4) Heard arguments of Sri B. Devanand, learned counsel for appellant/Insurance Company and Sri A. Chandraiah

Naidu, learned counsel for respondent No.1. Notice sent to R.2 served, but there is no representation on his behalf.

5a) Challenging the award directing the insurance company to pay and recover compensation from the insured/owner, learned counsel for appellant vehemently argued that the claimant travelled in the lorry, which is a goods vehicle, as an unauthorized passenger and therefore, his risk will not be covered under the terms of Ex.B.1—Policy. Learned counsel further argued that even accepting that he travelled in the lorry as a coolie, still his risk will not be covered for the reason that Ex.B1—Policy was only an Act Policy issued in terms of Section 147 of Motor Vehicles Act (for short 'the Act'), whereunder, the risk of a coolie is not covered since no additional premium was paid. Thus, either way, the policy will not enure to the benefit of the claimant, but the Tribunal, erroneously directed the insurance company to pay compensation and recover from the insured. He expatiated that when policy does not cover the risk of a particular person, the question of directing insurance company to pay compensation at first and later recover from the insured/owner does not arise and to buttress this argument, he relied upon in an unreported decision of this Court in MACMA No.2754 of 2009 (***The New India Assurance Company Limited v. Pusalapati Obulesu and another***)[1], wherein it was held that when a policy does not cover the risk of a person, no pay and recovery order can be passed against the insurance company. He, thus, prayed to allow the appeal and exonerate the insurance company from its liability.

6) Per contra, learned counsel for respondent/claimant argued that the claimant was not a gratuitous or unauthorized passenger but he travelled as a loading and unloading coolie, which is evident from the pleadings and evidence, and therefore, his risk shall be deemed to cover under the terms of Ex.B.1—Policy. Learned counsel, alternatively, argued that even assuming that Ex.B.1—Policy does not cover the risk of the claimant as a coolie on the ground that no premium was paid to give coverage to the risk of coolies, still, the insurance company cannot repudiate its liability for the reason that the facts and evidence would show that the claimant sustained injuries after falling down from the lorry and thereafter, at the time of receiving injuries, he was a 3rd party with reference to crime lorry, but not a gratuitous or unauthorized passenger or a coolie for that matter. He argued that when it is accepted that the claimant sustained injuries in the capacity of 3rd party, the liability of insurance company to honour the claim of 3rd party is absolute in terms of Section 147 of the Act as well as Ex.B.1—Policy because premium was collected by the insurance company to invariably cover the risk of 3rd party.

He relied upon in an unreported judgment of this Court in the case of ***The United India Insurance Company Limited v. Beebavva and 5 others***[2] (MACMA No.1661 of 2007, dt. 12.11.2014) to stress the point that when a person fell down from a vehicle and then receives injuries, he would be treated as a 3rd party but not as a passenger. He further submitted that if his alternative argument is accepted, the Court may be pleased to hold that the appellant/insurance company is totally responsible to pay compensation instead of paying first and recovering later. He, thus, prayed to dismiss the appeal.

7) In the light of above rival arguments, the point for determination is:

> *"Whether the Award of the Tribunal insofar as fastening liability on the insurance company and directing it to pay and recover the compensation from insured/owner is factually and legally sustainable?"*

8) **POINT**: Accident, involvement of Lorry bearing No. AAC 8739 and the claimant receiving injuries are not in dispute. The poignant argument of the appellant is that neither in the capacity of an unauthorized passenger nor a coolie, the risk of the claimant is covered under Ex.B.1—Policy for the reason that no additional premium is paid to cover his risk in either capacity. Before appreciating his argument, it is required to know in which capacity the claimant travelled in the lorry. In the claim petition, he pleaded that he travelled in the crime lorry as a coolie. In Ex.A.2—Charge sheet, the claimant was

shown as LW.5 to speak the facts of his travelling in the lorry as a coolie and sustaining injuries due to falling from the lorry. Thus, the plea of the claimant and the evidence would establish that he travelled in the ill-fated lorry in the capacity of loading and unloading coolie, but not as an unauthorized/gratuitous passenger.

9) It has now to be seen whether Ex.B.1—Policy covers his risk or not. In this context, Ex.B.1—Policy shows that it is an Act Policy issued in terms of Section 147 of M.V.Act and there is no specific mentioning in it to the effect that premium was paid to extend the risk of the coolies therein. Thus, it is clear that the policy does not cover the risk of the claimant either as a coolie or as an unauthorized/gratuitous passenger. In the above cited unreported decision (1 supra), it was held that the risk of a cleaner in goods vehicle was not covered under the terms of the policy, which was an Act Policy as no additional premium was paid to cover his risk. Hence, the decision of the lower Tribunal directing the insurance company to pay and recover from the insured was set aside by fixing liability only on the owner of the vehicle. Having regard to this precedential jurisprudence and facts of the instant case, the lower Tribunal could not have directed the appellant/insurance company to pay and recover.

10) However, that is not end of the matter. We need to scrutinize the alternative argument advanced by the learned counsel for respondent /claimant. He would argue that the

claimant received injuries after falling down from the vehicle in the capacity of a 3rd party and thereby, the insurance company could not repudiate its liability. I find much force in this argument. The pleadings and evidence, particularly, EX.A.1—FIR and Ex.A.2—Charge Sheet, would show that the claimant sustained injuries after falling down from the vehicle. Therefore, he was a 3rd party with reference to the crime vehicle at the time of receiving injuries. This aspect was well delineated in a catena of decisions in ***National Insurance Company Limited vs. Zuleka Begum***[3], this Court in similar circumstances referring to the cases cited in ***United India Insurance Company Limited rep. by its Branch Manager vs. Kurva Yejju Mallamma and others***[4]*, **A. Subramani vs. Mani and others***[5]***, Kanwar Shamsher Singh and others vs. Satbir Singh and others***[6]***, Thoznilalar Transport Company vs. Valliammal and others***[7] *and* ***Oriental Insurance Co. Ltd. and another vs. Edward D'Cruz and others***[8]***,*** has held that when a person who fell down from a vehicle and injured will no longer remain as a passenger but a third party and in such event the policy shall invariably cover his risk. In the unreported decision cited by the respondent also(2 supra), the same point was reiterated. Therefore, in that view of the matter, it can be said that the risk of the claimant is covered by Ex.B.1. Therefore, the Insurance company cannot claim exemption from liability.

11) In the result, this MACMA filed by the Insurance Company is dismissed and ordered as follows:

a) Respondent Nos. 1 and 2 in the OP i.e., owner/insurer and the insurance company, are jointly and severally liable to pay the compensation to the claimant; and

b) Respondents in the OP are directed to deposit the compensation amount within two (2) months from the date of this judgment, failing which execution can be taken out against them; and

c) No costs in the appeal.

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

U. DURGA PRASAD RAO, J

Date: 09.06.2016
eha/scs

[1] MACMA No.2754 of 2009

[2] MACMA No.1661 of 2007, dt. 12.11.2014

[3] 2015(1) ALT 162

[4] 2007 ACJ 1735 (AP) = 2007 (1) ALD 364

[5] 1990 ACJ 37 (Madras)

[6] 2006 ACJ 789 (Delhi)

[7] 1990 ACJ 201 (Madras)

[8] 1995 ACJ 1106 (Bombay)