THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

M.A.C.M.A.Nos.309 and 310 of 2009

COMMON JUDGMENT:

MACMA Nos.309 and 310 of 2009 are preferred by the Insurance Company aggrieved by the Awards dt:08.09.2008 in MOP Nos.443 of 2005 and 442 of 2005 respectively passed by the Chairman, MACT–cum–IX Additional District and Sessions Judge (FTC), Visakhapatnam (for short 'the Tribunal'). Both the appeals arise out of same accident.

2) The parties in both the appeals are referred as they are arrayed before the lower Tribunal.

3 a) The claim of the petitioners in both the cases is that on 14.09.2003, they were travelling as quarry labourers in lorry bearing No.AP 31 W 9869 with a load of gravel from Tagarapuvalasa to Visakhapatnam and on the way when the lorry reached Yendada, the driver tried to overtake the RTC bus and in the process dashed an auto rickshaw and thereby lorry turned turtle towards a hill slope and in the resultant accident, the cleaner, petitioners and some other coolies sustained injuries. With these averments, the claimant in MOP No.443 of 2005 claimed Rs.25,000/- and the claimant in MOP No.442 of 2005 claimed Rs.1,00,000/- as compensation against respondents 1 and 2 in the O.Ps who are the owner and insurer of the offending lorry. R.1 remained *ex parte* and R.2/insurer *inter alia* contended that the risk of the claimants

would not cover as there was no contract between R.1 and R.2 in that regard and hence R.2 was not liable to pay compensation. After full-fledged trial, the Tribunal awarded Rs.10,000/- in MOP No.443 of 2005 and Rs.15,000/- in MOP No.442 of 2005 against respondents 1 and 2 with a direction that the R.2/insurer shall deposit the compensation and realise the same from the owner of the vehicle.

Hence the appeals at the instance of Insurance Company.

4 a) **<u>M.A.C.M.A. No.309 of 2009</u>**: Heard arguments of Sri Katta Laxmi Prasad, learned counsel for appellant/Insurance Company. Though notice to respondents 1 and 2 was served but there was no representation on their behalf, hence treated as heard.

b) **<u>M.A.C.M.A. No.310 of 2009</u>**: Heard arguments of Sri Katta Laxmi Prasad, learned counsel for appellant/Insurance Company. Though notice to respondents 1 and 2 was served but there was no representation on their behalf, hence treated as heard.

5) The main argument of learned counsel for appellant/Insurance Company is that the Tribunal though agreed with the contention of Insurance Company that the policy does not cover the risk of the petitioners as coolies, instead of exonerating the Insurance Company totally, erroneously directed it to deposit the compensation amount

and realise the same from the insured. Learned counsel vehemently argued that when the policy do not cover the risk of a particular claimant, the question of Insurance Company making the payment at first and realising the same from the insured later does not arise. In passing such order the Tribunal erroneously placed reliance on some decisions which have no bearing with the case on hand. Learned counsel thus prayed to allow the appeals and exonerate the Insurance Company from the liability.

6) On a careful perusal of the entire facts and evidence and the relevant law, I find considerable force in the above argument. It is the case of the claimants that they travelled in the ill-fated lorry as labourers along with gravel load to go to Visakhapatnam. However, the contention of Insurance Company before the lower Tribunal is that they were unauthorised/ gratuitous passengers in the vehicle. Be that it may, a perusal of Ex.B.1—policy would show that as per the schedule, premium was paid to cover the risk of third parties; third party property damage and personal accident risk to owner-cum-driver and nothing more. Therefore, the risk of petitioners either as coolies or gratuitous/unauthorised passengers was not covered under the policy. The lower Tribunal in Paras 21 and 22 of its Awards, has rightly held that the risk of the petitioners will not be covered under the terms of the policy basing on the decisions of Apex Court in ***Oriental Insurance Company Limited vs. Devireddy Konda Reddy***

and others and Jogi Subbamma and others[1]. To this extent, the learned Tribunal was right.

a) However, the Tribunal relying upon ***United India Insurance Co.Ltd. vs. Suresh K.K. and another***[2] and ***The National Insurance Company Limited rep. by its Divisional Manager vs. Parital Venkateswarlu and another***[3] ordered the Insurance Company to pay and recover the compensation. In my considered view, the Tribunal was not right in making a pay and recover order. In ***Parital Venkateswarlu***'s case (3 supra) which was relied upon by the Tribunal, the facts are different. It was a case where the claimant while travelling as pillion rider in a motorcycle suffered injuries when the rider drove the vehicle in a rash and negligent manner and caused the accident. The claim of the claimant was resisted by the Insurance Company on the main plank of argument that the rider of the motorcycle had no valid driving licence. It must be noted that it was not its contention that the policy do not cover the risk of pillion rider. In that back drop, a learned Judge of this High Court relying upon the judgment of Apex Court in ***National Insurance Company Limited vs. Swaran Singh***[4] held in Para 20 of the judgment that the Insurance company failed to establish that the driver had no driving licence at the relevant time and it further failed that the breach of the licence condition by the owner has nexus or the necessary cause, which resulted in the accident and directed that the owner and insurer are jointly and severally liable to pay compensation. So the cited decision predominantly related to a driving licence issue but not in respect of non-coverage of policy to the claimant as in the instant case. Since the Insurance Company failed to establish firstly the lack of licence by the driver and secondly that the said breach committed by owner was the fundamental one, compensation was awarded against both insurer and insured. Hence in my view the Tribunal ought not to have drawn inspiration from the said decision to issue pay and recovery direction.

b) Sofaras as ***Suresh K.K***'s case (2 supra) is concerned, the claimant therein was an unauthorised passenger in a goods vehicle who suffered injuries in the accident. Hon'ble Apex Court in clear terms held that if a person travelled in the capacity other than the owner of the goods, the insurer would not be liable. For this purpose, the Apex Court relied upon its earlier judgment reported in ***National Insurance Co. Ltd. vs. Baljit Kaur & others***[5]. Having held so, taking the facts of that case into consideration that the claimant was a coolie worker, the accident took place long back on 13.08.1999 and it would be difficult for him to realise the dues from the owner of the vehicle and that the Insurance Company has already deposited the amount, the Apex Court issued a direction to the Insurance Company to pay the amount to the claimant and realise the same from the owner of the vehicle. In that case the ratio was that the risk of a gratuitous/unauthorised passenger of a goods vehicle will not be covered under the terms of the policy. It was only due to the peculiar fact situation, pay and recovery direction was issued in that case. So, in my view the lower Tribunal ought not to have issued such a direction having found that the risk of the claimants in both the appeals was not covered under the terms of policy. Hence the appeals deserve to be allowed.

7) In the result, both the appeals are allowed and ordered as follows:

a) The Insurance Company (R.2 in the O.Ps) is exonerated from the liability.

b) R.1 in the O.Ps/owner of the vehicle shall alone pay compensation to the claimants within two (2) months from the date of this judgment, failing which execution can be taken out against him.

c) However, pending appeals if the appellant/Insurance Company paid any compensation to the claimants, it can recover the same from the owner of the vehicle (R.1 in the O.Ps) but not from the claimants.

d) No costs in the appeals.

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

U. DURGA PRASAD RAO, J

Date: 16.02.2016
scs

[1] 2003 ACJ 468 = AIR 2003 SC 1009

[2] 2008(4) ALT 11 (SC)

[3] 2008(4) ALT 521 (AP)

[4] AIR 2004 SC 1531

[5] (2004) 2 Supreme Court Cases 1