SMT JUSTICE T. RAJANI

<u>MACMA.Nos.2244, 2243, 2260, 2261 and 2522 of 2008</u>

<u>COMMON JUDGMENT</u>:

These appeals are preferred by the appellant-insurance company, who is respondent No.2 before the Court below, assailing the similar but different judgments of the Court below in OPs.No.265, 264, 262, 263 and 266 of 2006 all dated 28.03.2004.

2. The grounds in MACMA.No.2260 of 2006, which are as below, would suffice to be noted, as the grounds in the other appeals are also same:

The Court below failed to appreciate that the respondents failed to prove any cause of action against the insurance company and there is no contractual liability contracted under the policy. The Court below failed to note the positive case set up by respondents 1 to 6 herein that the deceased and the injured were employees. The Court below failed to note that the deceased was not an employee and no claim is made under the Workmen's Compensation Act and that he is an unauthorized passenger, who is prohibited to travel on the tractor trailer for which no premium is paid. The tractor trailer is insured only for agricultural purposes and therefore, the claimants are not entitled for any compensation. The Court below failed to note that the driver of the vehicle did not have valid driving licence and hence, the appellant is not liable.

3. Heard both sides.

4. The counsel for the appellant takes a vehement stand on the two contentions put forth by him i.e. with regard to the absence of valid driving license and with regard to the lack of coverage under the insurance policy taken by the owner of the crime vehicle.

5. The driver of the crime vehicle, in this case had driving licence for light motor vehicle non transport and transport HTV, which means heavy transport vehicle. The tractor can be categorized either as LMV or HTV depending on the laden weight and the driver had driving license to drive both light and heavy motor vehicles. This Court in MACMA.Nos.484 and 486 of 2008 dated 17.03.2017 held as under:

> "The admitted fact is that the driver was holding the driving licence for light motor vehicle non transport. The light motor vehicle is defined in Section 2 clause 21 as *meaning a transport vehicle, the unladen weight of which, does not exceed 7,500 kilograms.* By virtue of that the transport vehicle, gets included in the definition of light motor vehicle. The observation of the lower Court, with regard to the weight of the vehicle, is that no evidence is adduced in that regard. Hence on the failure of the appellant to prove the weight of the vehicle, the vehicle has to be construed as a light motor vehicle, below the weight of 7,500 kilograms. In such circumstances, the driver of the crime vehicle stands holding valid driving licence as on the date of the accident.
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> In the case of *S.IYYAPAN Vs. UNITED INDIA INSURANCE COMPANY LIMITED AND ANOTHER* [(2013) 7 SCC 62] the Apex Court had categorically held *"The insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer*

to proceed against the insured for recovery of amount in the event there has been violation of any condition of the insurance policy."

In view of the above, the first contention of the counsel can be rejected.

6. As regards the second contention with regard to liability, the following judgment of this Court in Court that MACMA.No.2247 of 2006 dated 08.09.2017 was decided by this Court in the same factual scenario and the findings in the said appeal are extracted hereunder:

"POINT No.1:

4. The policy is an act policy and the same is not disputed. The conditions of the policy stipulate that the insurance company shall not be liable if the vehicle is used otherwise than in accordance with the limitations as to use. The limitations as to use include hire or reward, apart from others. Hence, it can be quickly concluded, on the basis of the terms of the policy, that the hire of the vehicle is not permitted by the policy conditions.

POINT No.2:

5. The counsel for the appellant takes help of the decision of the Supreme Court in *UNITED INSURANCE CO. LTD. v. TILAK SINGH* to draw support to his contention that the claimant is a gratuitous passenger, though he was travelling in a jeep which is not a goods vehicle. The question that came up for consideration before the Supreme Court is with regard to the liability of the insurer in respect of the death of or injury to a gratuitous passenger carried in a private vehicle. The vehicle involved in this case is not a goods vehicle. But, by expanding the principle laid by the Supreme Court in *NEW INDIA ASSURANCE CO. LTD. v. ASHA RANI*, that a passenger travelling in a goods vehicle is a gratuitous passenger, in *TILAK SINGH's* case, the supreme court held that although the observations in *ASHA RANI's* case were in connection with

carrying passengers in goods vehicle, the same would apply with equal force, to gratuitous passenger travelling in any other vehicle. Accordingly, the claimant, from the nature of his travel in the vehicle, as admitted by him, while deposing as P.W.1, nevertheless stands to be a gratuitous passenger. The vehicle is a hired vehicle, not by him but by his friends. He is not a fare paid passenger, as he did not pay any fare towards his travel in the said vehicle. Hence his nature of travel categorizes him as a gratuitous passenger.

<u>POINT No.3</u>:

6. Whether a gratuitous passenger should be deprived of compensation from the insurer, has been a vexed question, which painfully comes up, in spite of there being several judgments touching upon that question. In *TILAK SINGH's* case, the Supreme Court, after considering the decisions in *NEW INDIA ASSURANCE CO. LTD. v. SATPAL SINGH* [(2000) 1 SCC 237] and *ASHA RANI's* case, held that that insurer cannot be made liable for the compensation for the death of a gratuitous passenger travelling in a vehicle, which is not meant for the gratuitous travel of a passenger. That is the position of law which stands settled as on date.

<u>POINT No.4:</u>

7. The Supreme Court stopped at ruling that the insurer would not be liable for the death of a gratuitous passenger. It did not go into the issue of who should pay the compensation. The concept of pay and recover is of recent origin, meant to take care of the suffering undergone by not only innocent but also ignorant third parties. Hence, neither *ASHA RANI's* case nor *TILAK SINGH's* case can be held as an authority, on the issue involved in this appeal i.e. whether in case of the death of a gratuitous passenger, an order of pay and recover can be made against the insurer. Both *TILAK SINGH's* case and *ASHA RANI's* case, as already observed, only stopped at deciding that the insurer will not be liable for the death of a gratuitous passenger.

8. The approach of the High Court of Madras in CMA (MD).No.1772 of 1999 between *BRANCH MANAGER, NEW*

INDIA ASSURANCE CO. LTD. v. NARAYANAN AND OTHERS, while dealing with a similar case, impresses me. There the tribunal decided that the deceased was not a gratuitous passenger. But taking into consideration, an admission that the deceased was a gratuitous passenger, the question that was considered by the Court was whether the principle of pay and recover could be applied in that case. The deceased in that case was aged 12 years. The contention of the counsel for the appellant therein was that since the deceased was aged 12 years, the family of the deceased could not be economically deprived and therefore, the principle of pay and recover could not be applied. The counsel seems to have further argued that in the case of death of a person, like landlord, in an accident as gratuitous passenger, there could be no economic deprivation and in those cases, the principle of pay and recover could not be applied. It was also the argument of the counsel that if the deceased person, as a gratuitous passenger, is a bank employee and if the surviving wife is not an employee then the principle of pay and recover could be applied and the said principle cannot be applied if the surviving wife is employed in a bank or other reputed institutions. It was also argued that if there is death of an agricultural coolie in an accident, as a gratuitous passenger, then the principle of pay and recover could be applied. But his argument with regard to that case was that since the deceased was aged 12 years, she could not be treated as an agricultural coolie and the principle of pay and recover cannot be applied. But, ultimately, it was found by the Court that the deceased was proved to be an agricultural coolie and it was felt that it is a fit case to apply the principle of pay and recover.

What comes out from the above findings of the High Court of Madras is that the principle of pay and recover needs examination of the facts of the case. If the facts deserve application of the said principle, the said principle can be applied.

9. The observations of the Supreme Court in *UNITED INDIA INSURANCE COMPANY LIMITED v. LEHRU* [2004 (1) TN MAC 340 (SC)] would be of good guidance to decide

whether the interests of the victims need to be served by making an order of pay and recover. They are as follows:

> "... The law may provide for compensation to victims of the accidents who sustain injuries in the course of an automobile accident, compensation to the dependants of the victims in the case of a fatal accident. However, such protection would remain a protection on paper unless there is a guarantee that the compensation awarded by the courts would be recoverable from the persons held liable for the consequences of the accident. A court can only pass an award or a decree. It cannot ensure that such an award or decree results in the amount awarded being actually recovered, from the person held liable who may not have the resources. The exercise undertaken by the law courts would then be an exercise in futility and the outcome of the legal proceedings which by the very nature of things involve the time cost and money cost invested from the scarce resources of the community would make a mockery of the injured victims, or the dependants of the deceased victim of the accident, who themselves are obliged to incur not inconsiderable expenditure of time, money and energy in litigation. To overcome this ugly situation the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force. To use the vehicle without the requisite third party insurance being in force is a penal offence. The legislature was also faced with another problem. The insurance policy might provide for liability walled in by conditions which may be specified in the contract of policy. In order to make the protection real, the legislature has also provided that the judgment obtained shall not be defeated by the incorporation of exclusion clauses other than those authorised by Section 96 and by providing that except and save to the extent permitted by Section 96 it will be the obligation of the insurance company to satisfy the judgment obtained against the persons insured against third party risk (vide Section 96). In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to

> be armed with an insurance policy covering third party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terms of the money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather thus defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective."

10. The principle of pay and recover, as applied, in case of absence of driving licence or an appropriate driving licence to the driver can be extended to these kind of cases also. The generality of the observations in *LEHRU's* case, would allow me to apply the principle to this case, if it otherwise deserves.

11. Section 149 of the Motor Vehicles Act (for short 'the Act') specifies the extent of the liability of the insurer; Section 147 of the Act is the requirement of the policy and limits of liability. The policy, in this case, being an Act policy only need to satisfy Section 147 of the Act. Clause (c) of proviso to sub-section (1) of Section 147 prohibits a person being carried in a goods carriage. It does not speak about a person who travels gratuitously in a private hired vehicle. Going by the nature of the vehicle also, a third party can be expected to exercise their discretion before boarding the said vehicle. If it is a goods vehicle, the very appearance of the built of the vehicle, would give an understanding to everyone that no passengers are supposed to travel in such vehicle and if a person boards such vehicle in spite of the nature of the vehicle being obvious, such third parties may not be required to be compensated, as they themselves knowingly violated the obvious condition against travel in a vehicle, which is not meant for travel of passengers. But when it is a passenger carrying vehicle, the third party cannot be expected to understand that

there is a prohibition for a person to travel in such vehicle. With such distinction being available, the benefit of pay and recover can be extended to the claimant in this case, who travelled in a jeep, which is apparently meant to carry people.

12. At this juncture, what the Supreme Court also said, in *LEHRU's* case is apt to be remembered, as under:

> "...It needs to be emphasised that it is not the contract of insurance which is being interpreted. It is the statutory provision defining the conditions of exemption which is being interpreted. These must therefore be interpreted in the spirit in which the same have been enacted accompanied by an anxiety to ensure that the protection is not nullified by the backward looking interpretation which serves to defeat the provision rather than to fulfill its life-aim. To do otherwise would amount to nullifying the benevolent provision by reading it with a non-benevolent eye and with a mind not tuned to the purpose and philosophy of the legislation without being informed of the true goals sought to be achieved. What the legislature has given, the Court cannot deprive of by way of an exercise in interpretation when the view which renders the provision potent is equally plausible as the one which renders the provision impotent. In fact it appears that the former view is more plausible apart from the fact that it is more desirable. When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependants on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the ' main purpose' of the provision so that the 'exclusion clause' does not cross swords with the 'main purpose' highlighted earlier. The effort must be to harmonize the

two instead of allowing the exclusion clause to snipe successfully at the main purpose."

13. But I agree that there should be definitely a balancing of interests between the innocent victim and the insurer, whose policy is violated by a breach of its terms and fixing liability on whom may look apparently unjust. In this regard, again the observation made by the Supreme Court in *LEHRU's* case is relevant.

"... It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on some one and the statute has thought fit that it shall be borne by the insurer. That also seems o us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell' on the injured person, it would be due to no fault of his, it would have been a loss suffered by him arising out of an incident in the happening of which he had no hand at all."

In addition to the above, there is a recent decision of the Supreme Court in MANUARA KHATUN v. RAJESH KR.SINGH[1] wherein the Supreme Court dealt with the aspect of passengers, who were considered as gratuitous passengers and as regards the liability of the insurance company it observed as under:

"The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., *National Insurance Co. Ltd. vs. Baljit Kaur* [(2004) 2 SCC 1], *National Insurance Co. Ltd. vs.*

[1]2017 (2) ALD 65 (SC)

> *Challa Upendra Rao* [(2004) 8 SCC 517], *National Insurance Co. Ltd. vs. Kaushalaya Devi* [(2008) 8 SCC 246], *National Insurance Co. Ltd. vs. Roshan Lal* [Order dated 19.1.2007 in SLP (C) No. 5699 of 2006] and *National Insurance Co. Ltd. vs. Parvathneni* [(2009) 8 SCC 785].
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> This question also fell for consideration recently in Manager, National Insurance Company Limited vs. Saju P. Paul & Anr., (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover".

7. The insurance policy, in this case, is a policy, which covers the third party risk and also risk of 6 unnamed coolies, who travel in the vehicle, to an extent of Rs.25,000/- per each coolie. Now the dilemma of this Court lies in accepting the deceased or the injured, as the case may be, as a coolie. If they have to be considered as coolies, they would be entitled only for Rs.25,000/- as per the terms of the insurance policy. But if they are considered as third parties, the liability of the insurer would extend to the extent of paying compensation and recovering the same, if it is considered as a fundamental breach of the policy.

8. Counsel for the respondents/claimants furnished a decision of the Supreme Court in NATIONAL INSURANCE CO. LTD. v. BALAKRISHNAN[2] wherein also a policy, which is comprehensive/package policy, came up for consideration. The circular issued by the Traffic Advisory Committee (TAC) and the Insurance Regulatory and Development Authority (IRDA) was taken up for discussion. The relevant portion of the circular, as extracted in the above decision, can be extracted hereunder:

> "INSURANCE REGULATORY AND DEVELOPEMNT AUTHORITY
> Ref: IRDA/NL/CIR/F&U/073/11/2009
> Dated: 16.11.2009
> To,
> CEOs of all general insurance companies
>
> Re: Liability of insurance companies in respect of occupants of a Private car and pillion rider on a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).
>
> Insurers' attention is drawn to wordings of Section (II) 1 (ii) of Standard Motor Package Policy (also called Comprehensive Policy) for private car and two-wheeler under the (erstwhile) India Motor Tariff. For convenience the relevant provisions are reproduced hereunder:-
>
> 'Section II - Liability to Third Parties
> (1) Subject to the limits of liabilities as laid down in the Schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of -
>
> (i) death or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles

[2] (2013) 1 SCC 731

Act, the Company shall not be liable where such death or injury arises out of and in the course of employment of such person by the insured.'

It is further brought to the attention of insurers that the above provisions are in line with the following circulars earlier issued by the TAC on the subject:

(i) Circular M.V. No. I of 1978 - dated 18th March, 1978 (regarding occupants carried in Private Car) effective from 25th March, 1977.
(ii) MOT/GEN/10 dated 2nd June, 1986 (regarding pillion riders in a two-wheeler) effective from the date of the circular.

The above circulars make it clear that the insured liability in respect of occupant(s) carried in a private car and pillion rider carried on two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference."

The import of the above circular is that the person travelling in a private car is also brought under the terms third party. But the vehicle involved, in this case, is not a private car. Hence, no parity can be drawn between the facts of the case on hand and the facts dealt with by the Supreme Court in the above decision.

9. The counsel for the respondents/claimants relied on another decision of the Supreme Court in HANUMAGOUDA v. UNITED INDIA INSURANCE CO. LTD.[3] wherein the issue dealt with was with respect to the person accompanying the goods in the transit for the purpose of delivery. The facts of this case are that the deceased/injured was engaged by R1 for the purpose of loading and unloading the groundnut hay, hence, they stand on a different footing than the persons

[3] 2014 ACJ 681

accompanying the goods. Hence, no help can be taken from the above decision as well. But the conscience of this Court does not permit it to conclude that the deceased/injured are only unnamed coolies covered by the policy only to an extent of Rs.25,000/-, whereas a gratuitous passenger would be entitled to get the awards satisfied by the insurer in the first instance. It would only be just to extend the coverage that is available for a gratuitous passenger to the deceased/injured in this case also and hence, a direction to the appellant to pay the compensation and recover the same from the insured can be made.

The civil miscellaneous appeals are partly allowed, by setting aside the impugned judgment to the extent of fixing liability on the appellant is concerned. However the appellant shall satisfy the award and then recover the same from the insured. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.

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T. RAJANI, J

November 14, 2017
DSK