THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

MACMA No. 813 of 2010

JUDGMENT:

Aggrieved by the order, dated 25.02.2010, passed in MVOPNo.132 of 2008, the appellant M/s. National Insurance Company Limited, preferred this appeal.

2 Heard the arguments of the learned counsel for the appellant Sri Ravi Shanker Jandhyala and the learned counsel for the first respondent Sri P.Govind Reddy.

3. The brief facts of the case are that on 16.11.2007 while the injured was riding a motorcycle, and reached near Vinsari Petrol Bunk, a bus bearing No. TN-27R-7227 came from rear side in a rash and negligent manner and dashed the motorcycle. As a result, the rider and pillion rider of the motorcycle sustained injuries. Police registered a case in Crime No.122 of 2007 under Section 337 of IPC against the driver of the bus. The first respondent is the owner of the offending vehicle, the bus, remained *ex parte*. The second respondent, the insurer of the offending vehicle, filed counter alleging that the first respondent was not negligent in driving the offending vehicle, and that he was not having valid driving licence to drive the offending vehicle, and that the bus had no valid permit, and that it was a spare bus having a temporary permit issued by R.T.A to run it on the road on 17.11.2007. The bus was not having permit as on 16.11.2007. As such, the driver of the bus had no permit to ply the bus on 16.11.2007. Therefore, the second respondent is not liable to pay the compensation. It is also stated that the petition is bad for non-joinder of owner and the insurer of the motorcycle. It is further stated that the claim of the claimant is excessive.

4. The second respondent had also filed additional counter contending that the name of the first respondent is R.Settiya Gounder, but as per cause title of

the petition, it was shown as “R.Settiya G.R”. As per crime record and registration certificate, the first respondent is not the owner and the Sri R.Settiya Gounder is the owner, and therefore, the petition is liable to be dismissed.

5. The Tribunal, on consideration the evidence of PWs.1 to 4 and the documents Exs.A-1 to A-23 and the evidence of RWs.1 and 2 and the documents Exs.X-1 to X-3 has allowed the claim petition granting compensation of Rs.5,41,560/- holding the first respondent-owner of the vehicle was liable to pay the compensation, and exonerated the liability of the second respondent, and ordered the second respondent to pay at the first instance to the claimant and recover the same from the first respondent.

6. The appellant’s contentions is that the order of the Tribunal with regard to pay and recovery is unsustainable in the light of the findings that the insured violated the terms and conditions of the policy. It is further contended that there is contributory negligence on the part of the claimant, and the non-joinder of the owner and insurer of the motorcycle is fatal to the case of the respondents. It is further contended that the offending vehicle was not having valid permit. It is a violation of one of the conditions of the policy. Lastly it is contended that the compensation awarded by the Tribunal is highly excessive, and on these grounds, sought for setting aside the award.

7. The learned counsel for the appellant mainly contended that the date of accident was on 16.11.2007 and the fresh permit was obtained from 17.11.2007. Therefore, by the date of the accident, there was no valid permit for the offending vehicle to ply on the road. Because of the said violation of the breach of policy, pay and recovery cannot be ordered. Placing reliance on a decision reported in Mr.Deepak Kumar v. Mr.A.R. Bellure Gowda[1], learned counsel

[1] 2009 ACJ 2440

for the appellant contended that in view of the above decision, pay and recovery does not arise in this case.

8. In this regard, the Tribunal has given cogent reasons for assessing the liability of the insurer and the owner of the offending vehicle. Para 13 reads as under:

> *"In order to show that the vehicle had no route permit on the date of accident, the insurance company got examined Superintendent, RTO Office, Erode (Selvam) and relied upon Ex.X-2-extract of permit and Ex.X-3-extract of temporary permit. It is clear from Exs.X-2 and X3 that the offending bus is a spare bus and the temporary permit is for 16.11.2007 from Edappadi to Tirupati via Vellore, Chittoor and from 17.11.2007 from Tirupati to Chennai via Renigunta, Srikalahasti. In re-examination, R.W.1 has categorically stated that a bus having spare bus facility must get a temporary permit to ply a spare bus whenever a spare bus is used. The offending bus being a spare bus was used on the date of accident without permit. The accident had taken place on 16.11.2007 and the permit is from Edappadi to Tirupati via Vellore, Chittoor and from Tirupati to Chennai via Renigunta, where the accident had taken place. I, therefore, find that the first respondent got plied the offending bus without permit and thereby violated one of the conditions of Ex.B-1 policy."*

9. The finding of the Tribunal that the first respondent got plied the offending bus without permit has violated the condition of Ex.B-1 policy. The Tribunal has placed reliance on Division Bench decision of this Court in United India Fire And General Insurance Company Limited (Unit Madras Motor General Insurance) v. Maddali Suseela and Seven Others[2], wherein it has been held that a third party is nothing to do with the violation of the conditions of the policy. The Tribunal also placed reliance on a decision in Oriental Insurance Company Limited v. Bishan Dass and Others[3] for the proposition that when an insurance company disputed its liability on the ground that the insured vehicle was used on a route for which there was no permit, the

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[2] 1979(1) An.WR 259

[3] 1988 ACJ 106

remedy available to it is to proceed against the insured for the breach of contract and to claim reimbursement to satisfy the award. The Tribunal placing reliance on the above two decisions has ordered pay and recovery against the appellant-insurer.

10. The Tribunal has placed reliance on the above two decisions and came to the right conclusion holding that the insurer liable to pay at the first instance and recover the same from the owner. The finding of the tribunal with regard to pay and recovery does not require any interference. The claimant is the third party. The contract of insurance was between the owner and the insurer. The owner of the offending vehicle is liable to pay compensation to the claimant. The insurer is vicariously liable to indemnify the compensation. In this case, the insurer was ordered to pay and recover as there was violation of terms of insurance policy due to permit violation.

11. In the instant case, the insured is a third party to the insurance policy. In the light of the decision in National Insurance Co. Ltd. v. Swaran Singh[4] Swaran Singh, the third party risk is covered. In National Insurance Company Ltd. v. Laxmi Narain Dhut[5] also, the same position was discussed. There is no contractual liability of the insurance company with the third party. It is created by legal fiction of Sections 147 and 149 of the Motor Vehicles Act. The said proposition of law was held in Laxmi Narain Dhut's case (5 supra).

12. On consideration of the evidence on record, I am of the considered view that the contention with regard to contributory negligence on the part of the rider of the motorcycle is not proved by the appellant. It is obvious that no evidence has been adduced by the appellant in that regard. The Tribunal has clearly discussed the rash and negligent act on the part of the driver of the offending bus, and therefore, the question of contributory negligence does not

[4] (2004) 3 SCC 297
[5] AIR 2007 SC 1563

arise in this case. As the contributory negligence is not proved, adding of owner and insurer of motorcycle does not arise. There are no merits in the appeal, and it is liable to be dismissed.

13. In the result, the appeal is dismissed. The award passed by the Tribunal in MVOPNo.132 of 2008, is confirmed. There shall be no order as to costs. Miscellaneous petitions pending, if any, shall stand closed.

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GUDISEVA SHYAM PRASAD, J

Date: 28.03.2017
Ccm

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

MACMA No. 813 of 2010

Date:28.03.2017

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