THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.4482 of 2004

JUDGMENT:

Having been aggrieved of the finding fastening joint and several liability on the insurance company along with the insured to pay the compensation awarded to the claimant, the appellant-Insurance Company preferred this appeal, under Section 173 of the Motor Vehicles Act, 1988, ('the Act' for short), assailing the award, dated 20.07.2004, of the learned Chairman, Motor Accidents Claims Tribunal-cum-District Judge, Cuddapah, passed in MVOP.No.388 of 2001.

2. I have heard the submissions of Sri Ravi Shankar Jandhyala, learned counsel for the appellant/insurance company ('insurance company', for brevity) and of Sri Nimmagadda Satyanarayana, learned counsel for the 1st respondent/claimant ('claimant', for brevity). The respondents 2 & 3, who are said to be the owners of the offending vehicle/tractor and trailer, though served with notices, did not enter appearance.

3. The facts, which are required to be stated as a prelude to this judgment, in brief, are as follows: - 'The injured claimant filed the claim petition initially against the insurance company and the 1st respondent, who was said to be the owner of the vehicle, and claimed a compensation of Rs.7,00,000/- for the injuries sustained and disability suffered on account of his involvement in the subject accident. During the pendency of the claim petition, the 3rd respondent was also impleaded stating that the 3rd respondent is the owner-cum-insured of the offending vehicle. Before the Tribunal, the insurance company alone contested the claim of the claimant. On merits and by the order/award impugned, the Tribunal partly allowed the claim petition with proportionate costs and awarded a lumpsum compensation of Rs.60,000/- together with interest at 9% per annum and fastened joint and several liability on the insurance company and the 3rd respondent to pay the same to the claimant, but, dismissed the claim petition without costs against the 1st respondent and permitted the claimant to withdraw the compensation awarded, interest and costs.'

4. As already noted, having been aggrieved of the award fastening the liability on the insurance company to pay the compensation, the insurance company preferred this appeal.

5. Learned counsel for the insurance company contended as follows:

Even as per the averments in the claim petition, the claimant, who was waiting at Proddatur to board a bus to go to Kadapa, boarded the offending tractor and trailer bearing registration nos. AP 04/T.8095 & AP 04/T.8096 belonging to the 3rd respondent which was proceeding to Kadapa and travelled on it by sitting on the wooden plank on the back side of the driver's seat. He sustained injuries when the said tractor and trailer met with an accident on the way. Therefore, it is undisputed that at the time of accident, the deceased was travelling on the tractor by sitting on the plank behind the driver's seat of the tractor. Hence, the Tribunal ought not to have fastened any liability on the insurance company to pay the compensation. The Tribunal did not at all advert to the facts and legal position on this aspect and did not record any reasons for making the insurance company liable to pay the compensation awarded to the claimant. Moreover, the insurance company contended before the Tribunal that the tractor and trailer was not at all involved in the accident and that in the first information furnished by the injured to the police, the vehicle number was mentioned as A.P.04 5668 and that, as the said vehicle is not covered by any policy of insurance, the petitioner later changed the version and implicated the subject tractor and trailer in the accident to make an unlawful gain.

5.1 In support of the contention that in view of the averments in the claim petition and the admitted facts, no liability can be fastened on the insurance company to pay the compensation, he placed reliance upon the following decisions: (1) **Vachala and others v. V.R.Kumar and another**[1]; (2) **National Insurance Co.Ltd., v. Bommithi Subbhayamma and others**[2]; and (3) **National Insurance Co.Ltd., v. Swaroopa and others**[3].

6. Per contra, learned counsel for the claimant contended that the tractor and trailer is a goods vehicle and even if this Court comes to the conclusion that the deceased travelled as a gratuitous passenger on a goods vehicle, the insurance company is still liable to first pay the compensation awarded to the claimant and satisfy the award and then recover the same from the owner-cum-insured of the vehicle and that in any event the principle of 'pay and recover' can be applied to the facts of the present case.

6.1 In support of the said contention, he placed reliance on a decision of the Supreme Court in **Oriental Insurance Co. Ltd., v. Nanjappan and others**[4]

7. I have given earnest consideration to the facts and submissions.

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[1] 2004(5) ALT 460
[2] (2005) 12 SCC 243
[3] (2005) 11 SCC 419
[4] (2004) 13 SCC 224

8. Dealing first with the contention that the tractor and trailer was not at all involved in the accident and that in the first information given to the police, the injured claimant himself mentioned the number of the vehicle as AP 04 5668 and that as the said vehicle was not insured, he later changed his version and implicated the subject tractor and trailer in the impugned accident, what is to be noted is that the Tribunal, having considered the contents of the charge sheet, exhibit A3, which was filed after thorough investigation, concluded that the vehicle involved in the accident is tractor and trailer and not a two wheeler and further noted that the driver of the tractor and trailer was also prosecuted is evident from the calendar and judgment in CC.No.302 of 2000 on the file of II Additional Judicial magistrate of First Class, Kadapa, exhibit A11, wherein findings were recorded to the effect that the tractor and trailer was involved in the accident and that the version of the claimant with regard to the manner and method of accident is true. Therefore, there is ample evidence on record to come to a safe conclusion that the tractor-trailer was involved in the pleaded accident. Accordingly, the first contention of the insurance company which is without merit is rejected.

9. In view of the facts and the contentions advanced before this Court, the principal issue involved is with regard to the liability of the insurance company to pay the compensation awarded to the claimant.

9.1 It is no-doubt true that the claimant pleaded in the claim petition to the following effect: - 'On 13.11.2000 at about 09:30 PM, he was waiting at Proddatur to board a bus to go to Kadapa; having seen the tractor and trailer, bearing registration Nos. AP 04/T 8095 and AP 04/T.8096, proceeding on the way, he boarded the same to go to Kadapa and travelled on the tractor by sitting on a wooden plank behind the seat of the driver.' Thus, it is undisputed that the accident occurred when the claimant was travelling on the tractor and trailer by sitting on a plank behind the driver's seat. In this background of undisputed and admitted factual matrix, it is necessary to refer to the decisions cited.

In the decision in **Vachala's** case (1st cited), the facts and ratio are as follows: - 'The deceased travelled on an auto at the time of accident; the Tribunal exonerated the 2nd respondent-insurance company from liability as the deceased travelled on a goods vehicle; aggrieved thereof, the claimants preferred the appeal. This Court having noted that the insurer did not undertake to cover the risk of passengers in the offending vehicle held that the question of making the insurance company liable in respect of such passengers does not arise and dismissed the appeal of the claimants.'

In the decision in **Bommithi Subbayamma's** case [2nd cited], the facts and ratio are as follows: 'The deceased travelled in a lorry which met with an accident resulting in his death; the claims Tribunal exonerated the insurance company as the deceased travelled in a goods vehicle as a gratuitous passenger; the High Court reversed the finding of the Tribunal and fastened the liability on the insurance company; therefore, the insurance company filed Special Leave Petition before the Supreme Court; The Supreme Court having referred to the decisions in **New India Assurance Co.Ltd., v. Asha Rani [(2003) 2 SCC 223 ; Oriental Insurance Co.Ltd., v. Devireddy Konda Reddy [(2003) 2 SCC 339]; National Insurance Co.Ltd., v. Ajit Kumar [(2003) 9 SS 668]; National Insurance Co.Ltd., v. Baljit Kuar [(2004) 2 SCC 1]; National Insurance Co.Ltd., v. Challa Bharathamma [**(2004) 8 SCC 517**]; Pramod**

Kumar Agrawal v. Mushtari Begum [(2004) 8 SCC 667**]; and National Insurance Co.,Ltd., V. Chinnamma [**(2004) 8 SCC 697**]** held that the judgment of the High Court cannot be sustained and set it aside by allowing the appeal of the insurance company by reiterating the following legal position stated in Asha Rani's case:

> **It is, therefore, manifest that inspite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people.**

In the decision in **Swaroopa's** case [3rd cited], the facts and the ratio are as follows: 'The deceased died in an accident which occurred in the year 1996. The Tribunal fastened joint and several liability on the insured and insurer. The insurance company's appeal was dismissed on 27.08.2002 in view of the then prevailing law in view of the decision of the Supreme Court in **New India Assurance Co., v. Satpal Singh** [(2000) 1 SCC 237]. However, the Supreme Court observed that the said decision has been over ruled by the decision of the Supreme Court in Asha Rani's and allowed the appeal and dismissed the claim petition against the appellant-insurance company subject to certain terms.'

9.2 Placing reliance on the afore-said decisions, the learned standing counsel appearing for the insurance company strongly contended that in view of the settled legal position the insurance company cannot be made liable and that it cannot even be directed to first satisfy the award and then recover the amount paid by it from the owner/insured.

9.3 As noted, learned counsel for the claimant contended that the tractor and trailer is a goods vehicle and that the deceased travelled as a gratuitous passenger on the said vehicle and hence, the principle of 'pay and recover' can be applied.

9.4 Now, it is pertinent to refer to the latest decision of the Supreme Court in **Manuara Khatun and others v. Rajesh Kr.Singh and others**[5] wherein the Supreme Court considered the question – 'whether the appellants-claimants are entitled for an order against the insurer of the offending vehicle to pay the awarded sum to the appellants and then to recover the said amount from the insured in the same proceedings'. While answering the question, the Supreme Court observed that the said question remains no more *res integra*. Before proceeding further, it is to be noted that in this above cited recent decision, the facts disclose that the deceased were travelling as gratuitous passengers in the offending vehicle and therefore, the Supreme Court held at paragraphs 15, 16 and 17as follows:

> **"15. 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. V. Baljit Kaur and Ors. (2004) 2 SCC 1, National Insurance Co. Ltd. V. Challa Upendra Rao and Ors. (2004) 8 SCC 517, National Insurance Co. Ltd. V. Kaushalaya Devi and Ors. (2008) 8 SCC 246, National Insurance Co. Ltd. V. Roshal Lal, [Order dated 19.1.2007 in SLP (C) No.5699 of 2006], and National Insurance Co. Ltd. v. Parvathneni and Anr., (2009) 8 SCC 785.**
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> **16. This question also fell for consideration recently in Manager, National Insurance Co. Limited v. Saju P.Paul and Anr. (supra) wherein this Court took note of the entire previous case law on the subject mentioned above and examined the question in the context of**

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[5] 2017 (2) ALD 65 (SC)

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 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".

17. Justice R.M.Lodha (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under:

> 20. The next question that arises for consideration is whether in the peculiar fats of this case a direction could be issued to the Insurance Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).
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> 26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur, (2004)2 SCC 1 and Challa Upendra Rao, (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy **vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (National Insurance Co. Ltd. v. Saju P. Paul SLP (C) No.20127 of 2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount**

> **deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the Appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in *Challa Upendara Rao* (Supra).”**

9.5 Reverting to the facts of the case on hand, it is to be noted that the tractor and trailer is a goods vehicle is not disputed. The learned counsel for the claimant contended that tractor if drawing a trailer would constitute goods carrier and consequently would be a goods transport vehicle. The facts of the present case are identical to the facts of **Manuara Khatun’s** case as in the case on hand also the claimant travelled as a gratuitous passenger on a tractor and trailer which is a goods vehicle. Therefore, following the precedential guidance in the latest decision of the Supreme Court, this Court holds that a direction can be given to the insurance company to first pay the awarded sum to the claimant and then recover the said sum from the insured owner (3rd respondent) of the offending vehicle, tractor and trailer, which was involved in the accident, in execution proceedings arising in the case as per law laid down in paragraph 26 of the judgment in Saju P. Paul’s case. Point is accordingly answered.

10. In the result, the appeal is allowed in part and the impugned order/award is set aside only insofar as fastening absolute liability on the appellant-insurance company and instead the insurance company is directed to first pay the awarded sum to the claimant and then recover the said sum from the insured/owner (3rd respondent) of the offending vehicle/tractor and trailer, which was involved in the accident, in execution proceedings arising in the case as per law laid down in paragraph 26 of the judgment in Saju P. Paul's case.

No costs.

Miscellaneous applications, if any, pending shall stand closed.

M. SEETHARAMA MURTI, J

22.02.2018
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