SMT JUSTICE T. RAJANI

MACMA.No.1169 of 2013

JUDGMENT:

This appeal is preferred by the appellant-insurance company, who is the second respondent before the Court below, assailing the judgment of the V Additional District Judge, Vijayawada in MVOP.No.469 of 2009 dated 25.09.2012 on the ground that the Court below erred in directing the appellant to pay the amount and later, recover from the insured, though there is no liability on the part of the appellant.

2. Heard both sides.

3. This is a case where the deceased was travelling in a tractor trailer, along with load of mangoes and the first respondent engaged the deceased for loading and unloading of mangoes.

4. The Court below, while observing that there was no coverage for the coolies travelling in the vehicle, by following certain decisions, ordered that the appellant shall pay the award amount and recover the same.

5. Apart from the decisions relied upon by the Court below, the counsel for the respondent now takes help of the decision of the Supreme Court in SHIVAWWA v. BRANCH MANAGER, NATIONAL INSURANCE CO. LTD.[1] wherein the Supreme Court was dealing with a case of a person, who was travelling along with his goods.

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1 AIR 2018 SC 1640

The Supreme Court upheld the view that was taken by the High Court that the deceased therein was travelling with goods by reversing the finding of the trial Court that he was not travelling along with goods. At para 11 of the decision, it is observed as follows:

> "11. Assuming for the sake of argument that the insurance company was not liable to pay compensation amount awarded to the claimants as the offending tractor was duly insured, the insurer would be still liable to pay the compensation amount in the first instance with liberty to recovery the same from the owner of the vehicle (respondent No.2), in the light of the exposition in the case of *National Insurance Co. v. Swarn Singh and Ors.* [(2004) 3 SCC 297]

6. The counsel for the respondent also relied upon a decision of this Court in UNITED INDIA INSURANCE CO. LTD. v. GURRALA LAXMI VARAPRASAD[2] wherein it was observed as follows:

> "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 (1 supra), 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 (2 supra), 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.
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> POINT No.4:
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> 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

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[2] 2017 (6) ALD 625

origin, meant to take care of the suffering undergone by not only innocent but also ignorant third parties. Hence, neither ASHA RANI's case (2 supra) nor TILAK SINGH's case (1 supra) 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 (1 supra) and ASHA RANI's case (2 supra), 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 a 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."

7. Hence, what flows from the above dicta is that even if the deceased is proved to be a gratuitous passenger, since the policy was in existence by the date of the accident, the insurer would be liable to satisfy the award and later recover from the insured.

In view of the above, the civil miscellaneous appeal fails and is dismissed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

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T. RAJANI, J

July 13, 2018
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