

* **HIGH COURT OF DELHI : NEW DELHI**

MAC App. No.247 of 2004

% Judgment reserved on: 9th July, 2008

Judgment delivered on: 24th July, 2008

National Insurance Co. Ltd.
Regional Office-II,
2-E/9, Jandewala Extension
Delhi-110055

....Appellant

Through: Mr.L.K.Tyagi, Adv.

Versus

1.Surat Singh, S/o Sh.Bagari Ram,

2.Smt.Tara Wati, W/o Sh.Surat Singh

Both residents of RZ-422/5A,
Gali No.24, Sadh Nagar,
Palam Colony, New Dlehi-110045.

3. Ramesh Chand, S/o Prakash Chand,
149, Transport Centre, Punjabi Bagh,
New Delhi.

Aslo at:
Gwalior Roadways,
SN-32B, Gwalior. (M.P.)

4. M/s Chadha Motors,
1724, Naya Bazar,
Delhi.

...Respondents.

Through: Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Yes

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| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

This appeal under Section 173 of Motor Vehicles Act, 1988 (for short as 'Act') has been filed by the Insurance Company against the impugned award dated 21st April, 2004 passed by Sh. J.R.Aryan, Judge, MACT, Delhi.

2. The relevant facts for the disposal of the present appeal are that Devender Kumar, deceased aged 18 years died in an accident on 1.2.95. On the said date, there was some cultural program for the students at Ram Lal Anand College situated in the vicinity of Dhaula Kuan, Delhi. After the programme was over, the students including the deceased came out of the college. Meanwhile, the offending tempo no. DL-1CA-0215 arrived and stopped near the gate of the college. Students including the deceased, asked driver to carry them up to Dhaula Kuan and driver agreed after accepting charges for their transportation. All the students boarded the tempo to go Dhaula Kuan. The tempo driver is alleged to have driven

vehicle in a very high speed and lost control over the vehicle and it overturned on the way near South Campus at about 5.15 pm. As a result of the same, the deceased and other students sustained injuries. The deceased was taken to Safdarjang Hospital wherein he died on 02.02.95 because of the injuries sustained in the accident.

3. The claim petition was filed by the parents of the deceased.

4. The Respondent no.3 herein i.e. the Driver filed his written statement wherein he had denied his negligence.

5. Respondent no.4, the owner of the offending tempo remained ex parte and did not file any written statement.

6. The Appellant/Insurance Company herein has filed its written statement, wherein it was specifically pleaded that the Respondent no.3 was not having a valid driving licence at the time of accident and that the deceased was a gratuitous passenger who had been carried in the goods vehicle in breach of terms of the insurance policy and thus, the Appellant is not liable to pay any amount of compensation.

7. Vide impugned judgment, the Tribunal awarded the compensation of Rs.1,50,000/- along with the interest @ 8% from the date of filing of the petition.

8. Notice of this appeal was issued to all the Respondents.

9. Initially, Counsel for all the four Respondents appeared, but later on they absented.

10. On 19th March 2008, no one was present for the Respondents, hence in the interest of justice the order was deferred and matter for renotified on 9th July, 2008.

11. On 9th July, 2008, the matter was passed over since none appeared for the Respondents.

12. As none appeared for Respondents on two consecutive dates, the arguments advanced by Ld. Counsel for Appellant / Insurance Company were heard.

13. It has been contended by the Learned Counsel for Appellant that the tempo is a goods vehicle and carrying of passengers is not permitted and therefore, the deceased who was travelling in the said tempo was an unauthorized

passenger. The Policy of Insurance is not required to cover risk of an unauthorized and gratuitous passenger under section 147 of the Act. Thus, the Tribunal has erred in directing the Insurance Company to pay the award amount and then recover from the insured even though it was held that the deceased was a gratuitous passenger in a goods vehicle, who is not covered under the terms and conditions of the Policy of Insurance and the vehicle was driven by the driver who did not possess a valid driving licence at the time of accident, in the contravention of the terms and conditions as contained in the Policy of Insurance.

14. Ld. Counsel for the Appellant has cited ***National Insurance Co. Ltd. v. Bommithi Subbhayamma & Ors., III (2005) DMC 423 (SC) and National Insurance Co. Ltd. v. Baljit Kaur and others, 2004 ACJ 428*** in support of its contentions.

15. It may be pertinent to point out that Respondents no.1 & 2 have filed written reply to this appeal, where in it is stated that the deceased, Devinder Kumar in the said accident, was not a gratuitous passenger. The deceased along with the other students has got down from the said

tempo and were standing on the foot path for getting their balance amount from the driver of the offending vehicle since they have given him Rs.100/- note. After deducting the fare charges, driver had to return the balance amount to them. The driver went away with vehicle to get change of that hundred rupees note and came back with high speed. The driver drove in such a way that the tempo overturned and it fell upon students, who were standing by the road side resulting in the death of the deceased. It is further stated that the plea taken by the Appellant/Insurance company, that the driver of the offending vehicle was not in possession of valid and proper driving licence at the time of accident, has not been proved.

16. Respondent/Driver in his written statement had pleaded the defence that cause for the tempo overturning was that the diesel of another accidental vehicle had come on the road.

17. This plea was rejected by the Tribunal holding that if any oily material is seen spread on the road, it required rather more cautious driving, instead the vehicle being

driven in a high speed so that it may not slip and over turn. Vehicle over turned on the road in absence of any satisfactory explanation particularly requiring the driver to apply very strong brakes, an inference of fault and negligence on the part of the driver can be drawn and by that inference, the Tribunal found that cause of accident was due to fault and negligence on the part of the driver of the tempo.

18. Thus it was well established before the Tribunal from the evidence of eye witnesses, that the accident was caused by the rash and negligent driving of the tempo driver.

19. Now the question which arises of consideration is to whether deceased was travelling as a gratuitous passenger in the tempo or not?

20. As per the findings of the Tribunal, in the claim petition, it has been pleaded itself that “the victim sustained injuries while travelling in the tempo and tempo overturned.” However, evidence of two eyewitnesses in

that “they got down from the vehicle and thereafter tempo overturned and fell upon them” is not plausible.

21. The Tribunal further held that ;

“Moreover, as per my finding on issue No.1 that deceased victim Devinder was one of the gratuitous passengers who had boarded the tempo and as per terms of the policy described in ex. DW1/B, as regards use for carrying passengers, except employees other than driver not exceeding 6 in number and coming within the purview of Workman Compensation Act, no other person was permitted or entitled to travel in the vehicle. Vehicle has been described a goods carriage as far use is concerned. Accordingly owner injured committed breach of the policy on this account also.”

22. Insurance Company had examined three witnesses before the Tribunal. DW1, an official was called from its branch Amritsar but this witness only proved the carbon copy of cover note of this vehicle DL-1LA 0215 and proved it as ex.DW1/A and also placed on record an attested photocopy of Insurance Policy as ex.DW1/B. However, this witness had not been cross examined by the claimants counsel considering that claimant’s interest was protected in view of ***Baljit Kaur (supra)***.

23. DW2, also an official summoned from RTA Gwalior MP stated that no driving licence bearing no. R-3542-90 valid from 10.3.90 to 9.3.93 and further revalidated upto 8.3.96 purported to have been issued by licensing authority, Gwalior has been issued by the authority.

24. DW3 is again an official from Insurance Company who proved notice Ex.PW33/A issued by Advocate Sh. VPS Vohra for Insurance Company in terms of Order 12 Rule 8 of CPC calling upon owner/insured M/s Chadha Motors to produce D/L of Respondent/Driver, who was driving the vehicle at the time of accident. It was sent by registered post and postal receipt is proved as Ex.PW3/B and it shows that notice was addressed to the owner on the address particulars as were available to the Insurance Company from the insurance cover note as well policy. With that the Insurance Company concluded its evidence.

25. As regards the plea with regard to driving licence, Insurance Company has issued notice upon the owner and called upon owner to produce the driving licence of the driver but no response has been received from the owner. Further, DW2 has deposed that no such driving licence

bearing no. 3502-90 has been issued by the Licencing Authority, Gwalior. Since, Respondent/ driver had stopped appearing and to contest this claim, evidence of this defence witness remained uncontroverted. Thus, this evidence proves that driving licence which driver showed during police investigation he was possessing, has not been issued by the licencing authority and is not a genuine.

26. Thus, since the driver has been found not holding a valid driving licence then owner of the offending vehicle in absence of his presence and contest of the claim petition, must be taken to have committed breach of terms of the policy by allowing a person to drive the vehicle who was not holding a valid driving licence.

27. Further, a controversy arises as to whether the Appellant/Insurance Company has no liability whatsoever to pay the compensation amount as admittedly, the offending vehicle was carrying a gratuitous passenger.

28. In ***Bommithi Subbhayamma (supra)***, cited by the Appellant, the Apex court has observed as under;

“The question again came up for consideration before a 3-Judge Bench of this Court, of which

we are members, ***in National Insurance Co. Ltd. v. Baljit Kaur***, I (2004) SLT 269=(2004) ACC 259 (SC)=2004 ACJ 428 (SC), wherein upon considering the effect of amendment carried out in Section 147 of the Motor Vehicles Act, 1988 by Motor Vehicles (Amendment) Act, 1994, it was opined:

“By reason of the 1994 Amendment what was added is, ‘including the owner of the goods or his authorised representative carried in the vehicle’. The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of the Parliament, therefore, could not have been that the words ‘any person’ occurring in Section 147 would cover all persons who were traveling in a goods carriage in any capacity whatsoever. If such was the intention there was no necessity of the Parliament to carry out an amendment inasmuch as expression ‘any person’ contained in Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

The observations made in this connection by the Court in ***New India Assurance Co. Ltd. v. Asha Rani***, 2003 ACJ 1 (SC) to which one of us, Sinha, J, was a party, however, bear repetition :

‘(26) In view of the changes in the relevant provisions in the 1988 Act *vis-a-vis* the 1939 Act, we are of the opinion that the meaning of the words ‘any person’ must also be attributed having regard to the context in which they have been used, *i.e.*, a ‘third party’. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.’

In *Asha Rani* (supra), it has been noticed that Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of the 1994 Amendment would only cover a third party as also the owner of the goods for his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

It is, therefore, manifest that in spite 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 authorized representative remains the same. Although the owner of the goods or his

authorized 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 any premium was paid to the extent of the benefit of insurance to such category of people.”

29. In ***New India Assurance Co. Ltd. v. Vedwati & Ors., I (2007) ACC 924 (SC)***, the Apex Court has observed as under;

“The difference in the language of "goods vehicle" as appear in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of goods. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to Clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short 'WC

Act"). There is no reference to any passenger in "goods carriage".

"The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefore."

30. The same view was reiterated in ***National Insurance Co. Ltd. v. Prema Devi and Ors., (2008) 5 SCC 403***, by the Apex Court.

31. The issue involved in the present appeal is no more res integra as the Apex Court has taken a view that Section 147 of the Motor Vehicles Act does not envisage coverage of risk of gratuitous passenger and therefore, to carry a gratuitous passenger is clearly in violation of terms and conditions of the policy on the part of the owner, and consequently no liability to pay the compensation can be fastened on the insurance company. In such like cases even the recovery rights cannot be given as the insurance company is completely absolved from any liability to pay the compensation amount.

32. The impugned award dated 21.04.04, whereby the Tribunal has given directions to the Appellant/Insurance

Company to first pay the compensation amount and then to recover the same from the insured is set aside. The Appellant shall have no liability to even pay the compensation amount at the first instance as directed by the Tribunal.

33. However, Respondent Nos.1 and 2/Claimants shall be at liberty to claim the award amount from the owner/driver of the offending vehicle by initiating appropriate proceedings against the insured owner/driver of the offending vehicle.

34. In view of the above discussion, the present appeal is allowed.

35. No order as to costs.

July 24, 2008
Bisht

V.B.GUPTA, J.