

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 28th February, 2012

Pronounced on: 11th May, 2012

+ **MAC APP. 94/2005**

THE ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. P.K. Seth, Advocate

versus

RAM SHANKAR MANDAL & ORS. Respondents

Through: Nemo.

+ **MAC APP. 117/2005**

THE ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. P.K. Seth, Advocate

versus

UPENDER GUPTA & ORS. Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. MAC APP.94/2005 and MAC APP.117/2005 arise out of a common judgment dated 24.08.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of ₹2,61,000/- was awarded to the Legal Representatives for the death of Ram Kishore (MAC

APP.117/2005) and ₹17,000/- in favour of the first Respondent Ram Shankar Mandal (in MAC APP.94/2005) for suffering injuries in a motor accident which occurred on 16.05.1997.

2. The factum of accident, negligence and quantum of compensation are not disputed by the Appellant Insurance Company.
3. The sole ground raised in the Appeals is that the deceased Ram Kishore and injured Ram Shankar Mandal were gratuitous passengers along with other passengers on tempo No.DL-ILA-0013, which was insured with the Appellant. The insurance policy did not cover the liability of any passenger travelling in a goods vehicle except the owner or representative of the owner of the goods carried in the goods vehicle. The Claims Tribunal fell into error in holding that there was no conscious breach on the part of the owner of the vehicle and thus making the Insurance Company liable to pay the compensation. The relevant portion of the impugned judgment fastening the liability with the Appellant Insurance Company is extracted hereunder:-

“21. The petitioner Uma Shankar, who was travelling in the tempo and was injured in the accident, is an eye witness to the entire accident. He had appeared as PW2 and has deposed that on 16.5.97 at about 6 am, he was travelling from Samaypur Badli to Old Delhi, in a tempo no.DL-ILA 0013, which was being driven by its driver at a fast speed, in a rash and negligent manner. There were 7-8 other persons in the tempo. Near Morigate, the

tempo over turned causing injuries to the occupants. He sustained injuries on his head and fingers for which treatment continued for about 3 months. His daughter Chinku, who was also travelling in the same tempo also sustained head injuries for which the treatment continued for about 2 months.

22.The testimony of PW2 is corroborated by the injured Ram Shankar who has appeared as PW3 and has deposed on similar lines. The testimony of the witnesses has not been challenged in the cross examination. The factum of accident infact, has not been denied by the respondents. It is also corroborated by the FIR, certified copy of which is Ex.P2 and the challan, certified copy of which is Ex.P1. The mechanical inspection report is Ex.P3, which also shows that the said tempo was damaged. The post mortem report of deceased Ram Kishore is Ex.P4. The testimony of PW2 and PW3, sufficiently proves that the accident took place due to rash and negligent driving of tempo by its driver which resulted in death of Ram Kishore and injuries were caused to the petitioners Ram Shankar, Uma Shankar and Chinku.

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24.The respondent no.2 however, has deposed that her driver Ram Kumar, had never been permitted by her to use the tempo for carrying passengers. She had given the tempo on hire to Drum company in Wazirpur and the driver was reporting her only once in a week. The tempo was parked in the premises in the Drum company and that she had never charged any money from the passengers to travel in the tempo nor she ever gave such permission to her driver. It is further clarified by her in her cross examination that the driver only used to take her permission in the morning while transporting goods. It is further deposed by him that she was not aware that passengers was being carried in the tempo. It is further

deposed by her that she did not make any complaint against the driver to the police nor did she terminate him from the service till she sold the tempo in the year 2002, but this itself does not suggest that she was aware that the tempo was being used for carrying passengers.

25.The tempo may be goods carrying in which the passengers cannot be carried but the testimony of respondent no.2 sufficiently proves that she was not aware of the misuse of her tempo for carrying passengers and she has been using the same only for the carriage of goods. There may be violation of the terms of insurance policy but the owner of the vehicle has clarified that she was not aware of such breach. In Skandia Insurance Company Ltd. vs. Kokilaben Chandravadan & Ors. 1987 Supreme Court cases, Motor Vehicle Act, 1939, it was observed that section 92 (2) (b) (ii) extends immunity to the insurance company if a breach is committed of the condition in the insurance policy. However, the expression 'breach' is of great significance, that the insurer will have to abundantly establish that the insured is guilty of any violation of terms. The very concept of infringement or violation of the promise that the expression 'breach' carried without itself induces an inference that the violation, or infringement on the part of the promise was willful infringement or violation if the insured is not at all at fault and has done anything he should not have done or is not amiss in this regard then, such insured can not be held responsible for any breach it may have been committed. Unless the insured is at fault and is guilty of a breach, the insurer cannot escape from the obligation to indemnify the insured.

26.The insurance company had also asserted that the driver was not holding a valid proper and effective driving licence and therefore, it is not liable to pay the compensation. To corroborate this, the respondent no.3 has examined R3W1, who has produced the record pertaining to driving licence no.C96041066, which is

issued in the name of Ram Kumar which is Ex.R3W1/1. He has further deposed in his cross examination that the copy of driving licence which is Ex.R3W1/P1 is the same to which the report Ex.R3W1/1 pertains. It is further deposed by him the licence is valid that if the tempo is covered under LMV (Taxi). It was for the insurance company, to have proved that the tempo did not qualify as LMV but no evidence in this regard has been led by respondent no.3. The respondent no.3 has not been able to prove that the driver of the tempo was not holding a valid driving licence for driving the tempo. The respondent no.3 has thus, not been able to prove that it is no liable to pay the compensation.

27.In the light of above discussion, it is held that respondents have not been able to prove that they are not liable to pay the compensation. The liability of all the respondents is held to be joint and several.”

4. There is a distinction between the defences available to the Insurance Company under Section 149 (2) of the Act and the statutory coverage of insurance under Section 147 of the Act. In cases where the Insurance Company alleges breach of the terms of policy, it is required to prove the same. But, where risk in respect of a person i.e. passenger travelling in a goods vehicle is not required to be covered under the insurance policy, the Insurance Company could not be made liable at all. The words ‘injury to any person, including owner of the goods or his authorized representative carried in the vehicle’ were added in Section 147 (1) (b) (i) of the Act only to provide coverage to the owner of the goods or his authorized representative being carried in the vehicle.

5. In *National Insurance Company Limited v. Baljit Kaur & Ors.*, (2004) 2 SCC 1, the Supreme Court interpreted the provision of Section 147 of the Act after its amendment and held as under:-

"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 travelling 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 Asha Rani case (supra) 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 traveling in a goods vehicle, the insurers would not be liable therefore."

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 or 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.

The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani (supra). We, therefore, are

of the opinion that the interest of justice will be subserved if the appellant, herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the tribunal in such a proceeding.”

6. It is true that Smt. Kala Devi, the owner of the offending vehicle entered in the witness box and deposed that the vehicle was hired by a drum company in Wazirpur. She did not authorize the driver to carry any passenger or his relatives. She deposed that she did not charge any money from the passengers of the tempo. It may be true that she did not permit the driver to carry gratuitous passengers, but since the risk of their carriage was not covered under the insurance policy, the Insurance Company was under no obligation to indemnify the insured. The Claims Tribunal erred in fastening the liability on the Appellant Insurance Company on the ground that it had failed to prove the conscious breach of the terms of the policy.

7. The impugned order cannot be sustained; the same is accordingly set aside.
8. It is noteworthy that the entire compensation amount was deposited with the Claims Tribunal and was released in favour of the Claimants on 19.11.2004, before a stay was granted by this Court on filing of these two Appeals.
9. The upshot of the above discussion is that it was owner Kala Devi who was liable to pay the compensation instead of the Appellant. The compensation having been paid by the Appellant, it would be entitled to recover the same from the Owner/Respondent Kala Devi.
10. The statutory deposit of ₹25,000/- in each of the Appeals be refunded to the Appellant Insurance Company.
11. The Appeals are allowed in above terms.

(G.P. MITTAL)
JUDGE

MAY 11, 2012

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