

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

Reserved on: 13th July, 2012
Pronounced on: 6th August, 2012

+ **MAC.APP. 1103/2011**

ASHWANI KUMAR Appellant
Through: Mr. Atul Tripathi, Adv.

versus

ORIENTAL INSURANCE CO. LTD. & ORS Respondents
Through: Mr. Santosh Tiwari Proxy
Counsel for Mr. Ram N.
Sharma, Adv. for R-1.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Appellant who is the owner of Tata Tempo No.DL-1LE-5154, which caused the accident resulting in grievous injuries to Respondent No.2, takes exception to a judgment dated 03.09.2011 whereby the Motor Accident Claims Tribunal (the Claims Tribunal) while awarding a compensation of ₹3,45,398/- and making the First Respondent Oriental Insurance Company

Limited initially liable to pay the compensation, granted recovery rights to the First Respondent against the Appellant.

2. It is admitted case of the parties that the vehicle involved in the accident is a goods vehicle and it did not possess any permit at the time of the accident.
3. At the time of hearing, the following contentions are raised on behalf of the Appellant:-
 - (i) There was negligence on the part of Second Respondent (the Claimant). Hence, the Appellant had no liability to pay the compensation.
 - (ii) The Claims Tribunal awarded a compensation of ₹2,73,828/- for loss of leave. Since the Second Respondent did not suffer any pecuniary loss as he obtained paid leaves, he was not entitled to any compensation under this head.
 - (iii) Although, the Appellant did not possess any permit to ply the vehicle, yet, at the time of the accident, the vehicle was not being used as a goods vehicle and, therefore, there was no breach of the terms of the policy. Reliance is placed on the report of the Allahabad High Court in *State of U.P. v. Abdul Latif & Anr. AIR 1963 All 229*.
 - (iv) It is stated that even if there was a breach of the terms of policy, it was not such a fundamental breach so as to entitle the First Respondent to avoid its liability. Reliance

is placed on *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297.

4. This accident occurred while the Second Respondent was taking out his luggage from the Deluxe AC Coach in which he had traveled from Chandigarh to Delhi. It is not disputed that while tempo No.DL-1LE-5154 was passing near the bus in question, the left side wheel got detached from the tempo and hit the Second Respondent.
5. The Second Respondent as PW-1 testified that on 20.09.2010 at about 2:00 A.M. he was unloading his belongings from the AC Deluxe bus. A Tata tempo No.DL-1LE-5154 came in a rash and negligent manner. The left side wheel of the tempo got detached and hit him. He fell down and suffered grievous injuries. No suggestion was given to PW-1 that he himself was negligent. The factum of the left rear wheel getting detached from the tempo is not disputed. The Claims Tribunal while dealing with issue of negligence held that the tyres getting detached from the offending vehicle itself suggested negligence on the part of the driver and the owner, it was for the Appellant (being owner) and the driver of the offending vehicle to have come out with the circumstances under which the wheel got detached. The Claims Tribunal rightly drew an inference of negligence on the principle of strict liability. No fault thus can be found with the reasoning and finding reached by the Claims Tribunal on this score.

6. While dealing with the award of compensation for loss of leave, the Claims Tribunal observed as under:-

“Petitioner has stated that he was working as Dy. General Manager with the Bank and has filed salary slip Ex.PW1/3. Petitioner as per certificate of employer and the medical leave certificate of Sir Ganga Ram Hospital was on medical leave from 20/09/10 till 23/03/11 i.e. for about 06 months. The medical leaves were availed only on account of treatment of injuries in question. Petitioner could have utilized his medical leaves for other medical necessity. Accordingly, only basis pay of ₹45,638/- p.m. as loss for a period of 06 months is allowed. Total ₹45,638/- x 6 = ₹2,73,828/-.”

7. The principle for awarding damages under the law of torts which apply in a Claim Petition under the Motor Vehicles Act, 1988 (the Act) are that the victim or his legal representatives, as the case may be, are awarded compensation so as to place them in a situation as if no wrong was done to them.
8. Section 168 of the Act enjoins a Claims Tribunal to determine the amount of compensation which is just and reasonable. It can neither be a source of profit nor should be a pittance. In *State of Haryana v. Jasbir Kaur*, (2003) 7 SCC 484, the Supreme Court held as under:

“7. It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense ‘damages’ which in turn appears to it to be ‘just and reasonable’. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is

not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be 'just and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just' a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression 'just' denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just."

9. In *Raj Kumar v. Ajay Kumar* (2011) 1 SCC 343, the Supreme Court held that the object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so in a fair and reasonable manner.
10. Admittedly, the Second Respondent took leave on account of his incapacity to attend to his duties because of the injuries suffered in the accident. He admitted that he was paid the salary for the leave taken by him. The Second Respondent lost leave for a period of six months, which he could have availed

for other purposes. Although, the Second Respondent did not suffer any financial loss but loss of leave which he may be entitled to encash on year to year basis or at the time of his superannuation, has to be compensated in terms of money.

11. The Claims Tribunal, therefore, rightly awarded the compensation for loss of leave at the rate of his salary. The Claims Tribunal's finding in this regard cannot be faulted.
12. It is urged by the learned Counsel for the Appellant that at the time of the accident the offending vehicle was not being used as a goods vehicle as no goods were being transported at that time. The vehicle was being taken for parking and thus, it cannot be said that there was any breach of the terms of the policy which the Respondent Insurance Company is entitled to plead under Section 149 (2) (a) (i) (c) of the Act. The learned counsel for the Appellant places reliance on the report of the Allahabad High Court in *State of U.P. v. Abdul Latif & Anr.* AIR 1963 All 229, where it was held as under:-

“4. The learned Magistrate, believing the testimony of the Assistant Regional Transport Officer held that the transport vehicle was empty and there was no patient in it when it was checked on the Hathras-Aligarh route but relying upon the decision of the Madras High Court in In re T.V.Moidu, AIR 1960 Mad 265 he found the respondents not guilty and acquitted them. It was held in the above case that the word "using" does not mean the same thing as "driving" or "being in charge of the motor vehicle" and by driving an empty lorry at a place outside the route for plying not covered by the permit the

provisions of Sections 42 and 123 of the Act could not be said to have been offended.

5. On behalf of the State the correctness of the view of the Madras High Court has been challenged and it is urged that mere driving or propelling a transport vehicle is using a vehicle, and therefore driving a vehicle without, or in contravention of the terms of, a permit is an offence. A close examination of the provisions of the Act will show that there is a clear distinction between using a vehicle in the sense of driving or propelling it and using it for the purpose of carrying passengers or goods. Section 22 says:-

"No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place for the purpose of carrying passengers or goods unless the vehicle is registered in accordance with this Chapter and certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner."

The restriction against a driver is absolute and against an owner only to the extent of causing or permitting a vehicle to be driven for the carrying passengers or goods. In other words, no person can drive a motor vehicle without a registration certificate while an owner cannot cause or permit a vehicle to be used for carrying passengers or goods. The distinction is further brought out by the provisions of Section 123 (1) which says:-

"Whoever drives a motor vehicle or causes or allows a motor vehicle to be used in contravention of the provisions of Section 22 or without the permit required by Sub-section (1) of Section 42 or in contravention of any condition of such permit relating to the route on which or the area in which

or the purpose for which the vehicle may be used, shall be punishable....."

Although the words relating to an owner in Section 22 are "cause or permit the vehicle to be driven", a different language indicating the use of the vehicle with reference to its purpose has been used in Section 123. The liability of an owner for the use of a vehicle in contravention of the terms of the permit arises under Section 42 (1) which reads:

"No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or the Commission authorising the use of the vehicle in that place in the manner in which the vehicle is being used....."

Consistent with the other provisions of the Act the word "used" in Section 123 (1) can only mean the use of the vehicle for the purpose for which a permit is granted, namely, for carrying passengers or goods.

6. The Act contains a specific provision in Section 121 for punishing an owner for the mere driving of a motor vehicle. Section 121 is:-

"Any person who drives or causes or allows to be driven in any public place a motor vehicle or trailer while the vehicle or trailer has any defect, which such person knows of or could have discovered by the exercise of ordinary care and which is calculated to render the driving of the vehicle a source of danger to persons and vehicles using such place, shall be punishable with fine which may extend to two hundred and fifty rupees....."

7. I agree with the decision of the Madras High Court and hold that the transport vehicle being empty the owner Bhawani Shanker Gautam did not commit any offence.

8. But it is equally clear that the driver Abdul Latif was guilty. As already stated there is well defined distinction in the Act between driving as such and using a vehicle. If a person drives a vehicle in contravention of, or without, a permit, then on the plain language of Section 123 he is guilty.

13. It may be noticed that the Allahabad High Court was not dealing with any breach of the terms of policy in a Claim Petition under Section 110-A of the Motor Vehicles Act, 1939 (the Old Act). Rather it was a case for driving a goods vehicle without permit. The Allahabad High Court drew a distinction that since the vehicle was empty when it was being driven, the same cannot be said to be used by the owner Bhawani Shankar Gautam. He was, therefore, not guilty of committing the offence under Section 123 (1) of the Old Act. It was stated that the vehicle was being driven by the driver in contravention of the permit and, therefore, he was held guilty under Section 123 of the Old Act. Thus, it cannot be said that if the goods were not being carried in the vehicle at the time of the accident it will not be breach of the terms of policy if the vehicle was being driven without a permit.
14. The contention raised on behalf of the Appellant that driving a goods vehicle without permit is not fundamental breach of the

terms of the policy, is without any merit. Reliance on *Swaran Singh* is also misplaced.

15. *Swaran Singh* relied on *Jitender Kumar v. Oriental Insurance Company Ltd. & Anr.* (2003) 6 SCC 420 which was an own damage claim filed by the Insurer which had caught fire on account of mechanical failure. The Supreme Court held that the damage was not due to any fault, any act or omission on the part of the driver. The Insurance Company, therefore, could not have repudiated the claim of the insured.
16. In *National Insurance Company Ltd. v. Challa Bharathamma & Ors.* (2004) 8 SCC 517 which related to an auto rickshaw which was being driven without a permit, the High Court took the view that since there was no permit the question of violation of any condition thereof did not arise. The Supreme Court did not approve the reasoning of the High Court and held that when a vehicle was being plied without a permit defence under Section 149 (2) of the Act was available to the Insurer. Relevant portion of the judgment is extracted hereunder:-

12. The High Court was of the view that since there was no permit, the question of violation of any condition thereof does not arise. The view is clearly fallacious. A person without permit to ply a vehicle cannot be placed on a better pedestal vis-à-vis one who has a permit, but has violated any condition thereof. Plying of a vehicle without a permit is an infraction. Therefore, in terms of Section 149(2) defence is available to the insurer on that aspect. The acceptability of the stand is a matter of adjudication. The question of policy being operative had

no relevance for the issue regarding liability of the insurer. The High Court was, therefore, not justified in holding the insurer liable.”

17. In *New India Assurance Company Ltd. v. Prabhu Lal*, AIR 2008 SC 614 the accident was caused by a goods vehicle. It was not carrying any goods at the time of the accident. The Supreme Court reversed the finding of the State Commission and restored the finding of the District Forum that the Insurer could avoid liability as the vehicle involved in the accident was a transport vehicle and could not be treated as a non-transport vehicle if it was not carrying goods at the time of the accident. Paras 23 and 24 of the report are extracted hereunder:-

*“23. The District Forum held that the documents clearly mentioned that the vehicle was a ‘goods carriage’ as defined in Section 2(14) covered by the category of ‘transport vehicle’ under Section 2(47) of the Act. The State Commission held that since the gross weight of the vehicle was only 6800 kgs. and did not exceed permissible limits (7500 kgs.) nor it was carrying goods at the time of accident, it was a light motor vehicle. For coming to that conclusion, the State Commission relied upon *Ashok Gangadhar Maratha v. Oriental Insurance Company Ltd.* (1999) 6 SCC 620.*

24. In our considered view, the State Commission was wrong in reversing the finding recorded by the District Forum. So far as Ashok Gangadhar is concerned, we will deal with the said decision little later but from the documentary evidence on record and particularly, from the permit issued by the Transport Authority, it is amply clear that the vehicle was a ‘goods carrier’ [Section 2(14)]. If it is so, obviously, it was a ‘transport vehicle’ falling under Clause (47) of Section 2 of the Act. The District Forum was, therefore, right in considering the

question of liability of the Insurance Company on the basis that Tata 709 which met with an accident was 'transport vehicle'".

18. In *National Insurance Company Limited v. Kusum Rai & Ors.* (2006) 4 SCC 250 the accident was caused by a taxi. The driver possessed a licence to drive LMV (Non-Transport). Since the vehicle was admittedly a transport vehicle, the Supreme Court held that the Insurance Company was entitled to avoid its liability as there was breach of the terms of policy. Thus, it may be noticed that the same vehicle when used as a personal vehicle may need only a licence to drive LMV but when it is used as a taxi (a commercial vehicle), the driver needs a licence to drive a transport vehicle of the appropriate class. The owner is not permitted to take a plea that the vehicle being the same, the breach would not be fundamental, if it is registered as a commercial vehicle.
19. Thus, I am of the view that since the Appellant did not possess any permit to use the vehicle as a goods vehicle the Respondent Insurance Company was entitled to raise the statutory defence under Section 149 (2) of the Act. The Claims Tribunal rightly granted recovery rights against the Appellant.
20. The Appeal is devoid of any merit; the same is accordingly dismissed.
21. Statutory deposit of ₹25,000/- shall be refunded to the First Respondent.

22. The First Respondent shall be entitled to undertake execution to recover the balance amount as may be permissible under the law.
23. Pending Applications stands disposed of.

(G.P. MITTAL)
JUDGE

AUGUST 06, 2012
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