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

Decided on: 27th March, 2015

\+ **MAC.APP. 899/2011**

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.
..... Appellant

Through: Ms. Suman Bagga, Adv. with Mr. Saral Chaturvedi, Adv. & Mr. Pankaj Gupta, Adv.

versus

CHITRA BAHADUR KHATRI & ORS. ..... Respondents

Through: Mr. Sanjeev Srivastava, Adv. for R-1.

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

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. Appellant Bajaj Allianz General Insurance Company Limited impugns the judgment dated 03.08.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of Rs.1,96,034/- was awarded to Respondent no.1 for having suffered injuries in a motor vehicular accident which occurred on 02.04.2010.

2. At the time of hearing of the appeal, negligence on the part of the driver of the offending vehicle and the quantum of compensation is

not challenged.

3. It is urged by learned counsel for the Appellant that the Appellant had proved before the Claims Tribunal that Respondent no.1 was a gratuitous passenger travelling in a goods vehicle and therefore, the Appellant had no liability to pay the compensation at all.

4. It is further argued that although the driver was driving the commercial vehicle, he possessed a driving licence to drive a non-transport vehicle only.

5. It is urged that while awarding the compensation of Rs.1,96,034/- and holding the Appellant liable to pay the compensation, the Claims Tribunal granted recovery rights on the premises that the insured committed breach of the terms and conditions of the insurance policy. The learned counsel for the Appellant also contends that it is not only the case of breach of the terms and conditions of the insurance policy, but a case of no liability at all as risk of a passenger travelling in a goods vehicle other than the owner of the goods or the representative of the owner of the goods is not covered under the policy of insurance.

6. None has appeared on behalf of the owner and driver despite service.

7. Learned counsel for Respondent no.1, however, states that the compensation awarded is on the lower side. It is stated that Respondent no.1 had suffered permanent disability and thus, some compensation ought to have been awarded to him towards loss of earning capacity.

8. Respondent no.1 has not filed any cross-objections or cross appeal. It will not be permissible to go into the new question raised on behalf of Respondent no.1 which is alien to the contention raised in the appeal.

9. The learned counsel has referred to the testimony of Chitra Bahadur Khatri (Respondent no.1 herein) and particularly his cross-examination and has urged that Respondent no.1 was being carried as a passenger on charge of Rs.10/- as a fare. The risk of the passenger being not covered, the Insurance Company is not liable to indemnify the insured. In cross-examination, PW-1 stated as under:-

> *".... The vehicle Mahindra Champion in which I was travelling was a goods carrying vehicle. I was going to Burari on foot and the driver of the tempo Mahindra Champion asked me "Where you are going?" Then I told him that I was going to Burari. Driver of tempo told me that he would drop me to Burari in his tempo. Vol. He said that he would charge Rs.10 for his service...."*

10. The question of liability of Insurance Company in respect of gratuitous passenger was gone into by me in *Oriental Insurance Company Limited v. Kaushalya Devi & Ors., MAC APP.19/2005, decided on 14.12.2011* and it was held that the Insurance Company has no liability at all to pay the compensation in respect of gratuitous passenger travelling in a goods vehicle. While referring to *New India Assurance Company Limited v. Asha Rani & Ors. (2003) 2 SCC 223,* it was held that the three Judge Bench decision in *Asha Rani* overruled the decision in *New India Assurance Company v. Satpal Singh (2000) 1 SCC 237* and that it was not laid down as a proposition of law that in the case of gratuitous passenger travelling in a goods vehicle, the Insurance Company will first pay the compensation awarded and would then recover it from the insured. In paras 5,6,7 and 9, I had observed as under:-

> *5. In the case of New India Assurance Company Ltd. v. Asha Rani & Ors. (2003) 2 SCC 223, the decision in New India Assurance Company v. Stapal Singh (2000) 1 SCC 237 was overruled and it was held that Section 147 of the 1988 Act did not impose any statutory liability on the owner of vehicle to get his vehicle insured for any passengers travelling in a goods vehicle and therefore, the insurers would not be liable (for the claim of such persons travelling in goods vehicle). Their Lordships' compared the definition of goods vehicles as given in 1939 Act and*

in the 1988 Act. The relevant parts of the report in Asha Rani (supra) are extracted hereunder:-

"14. Before adverting to the pointed issue, we may notice the definition of "goods vehicles", "public service vehicle" and "stage carriage" and "transport vehicle" occurring in Sections 2(8), 2(25), 2(29) and 2(33) of the 1939 Act, which are as under:-

"2(8) "goods vehicle" means any motor vehicle constructed or adopted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or <u>in addition to passengers</u>:"

(25) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage;"

(29) "stage carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;

(33) "transport vehicle" means a public service vehicle or a goods vehicle;" (emphasis supplied)

15. Sections 2(14), 2(35), 2(40) and 2(47) of 1988 Act define "goods carriage", "public service vehicle", "stage carriage" and "transport vehicle" in the following terms:-

"2(14) "good carriage", means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods;

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a

maxicab, a motorcab, contract carriage, and stage carriage;

(40) "stage carriage" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey;

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle;" (emphasis supplied)

16. The changes effected in the respective terminologies in the 1988 Act have a bearing on the question involved in these appeals.

17. Chapter VIII of 1939 Act and Chapter XI of 1988 Act deal with insurance of motor vehicles against third party risks.

18. Liability has been defined in Section 145(c) as under-

"145. (c)" 'liability', wherever used in relation to the death of or bodily injury to any person, includes liability in respect thereof under Section 140;"

19. Section 146 specifies the necessity for insurance against third party risk. In terms thereof an owner of a motor vehicle is statutorily enjoined to have a policy of insurance complying with the requirements of the said chapter before he uses or causes or allows any other person to use a motor vehicle in public.

20. Section 147 deals with requirements of policies and limits of liability. Proviso appended thereto, however, makes an exception to the main provision which reads thus:-

"Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of an in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923) in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability."

21. We may notice that the proviso appended to Section 95 of 1939 Act contained Clause (ii) which has been omitted in the 1988 Act and reads as under:-

"(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises."

22. Thus, it may be noticed that so far as employees of the owner of the motor vehicle are concerned, an insurance policy was not required to be taken in relation to their liability other than arising in terms of the provisions of the Workmen's Compensation Act, 1923. On the other hand, proviso (ii) appended to Section 95 of 1939 Act, enjoined a statutory liability upon the owner of the vehicle to take out an insurance policy to cover the liability in respect of a person who *was travelling in a vehicle pursuant to a contract of employment. The Legislature has consciously not inserted the said provision in 1988 Act.*

23. The applicability of the decision of this Court in Mallawwa (Smt.) and Ors. v. Oriental Insurance Company Ltd. and Ors. (1999) 1 SCC 403 in this case must be considered keeping that aspect in view. Section 2(35) of 1988 Act does not include passengers in goods carriage whereas Section 2(25) of 1939 Act did as even passengers could be carried in a goods vehicle. The difference in the definitions of the "goods vehicle" in 1939 Act and "goods carriage" in 1988 Act is significant. By reason of the change in the definitions of the terminology, the Legislature intended that a goods vehicle could not carry any passenger, as the words "in addition to passengers" occurring in the definition of goods vehicle in 1939 Act were omitted. Furthermore, it categorically states that 'goods carriage' would mean a motor vehicle constructed or adapted for use "solely for the carriage of goods". Carrying of passengers in a 'goods carriage', thus, is not contemplated under 1988 Act.

24. We have further noticed that Section 147 of 1988 Act prescribing the requirements of an insurance policy does not contain a provision similar to Clause (ii) of the proviso appended to Section 95 of 1939 Act. The decisions of this Court in Mallawwa's case (supra) must be held to have been rendered having regard to the aforementioned provisions.

25. Section 147 of 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the *liability under the Workmen's Compensation Act. It does not speak of any passenger in a 'good carriage'.*

26. In view of the changes in the relevant provisions in 1988 Act vis-a-vis 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 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."

6. The Tribunal however relied on Para 21 of the report in National Insurance Company v. Baljit Kaur & Ors. (2004) 2 SCC 1 and reasoned that the compensation can be paid in the first instance by the Insurance Company and it can be recovered later on from the owner. Relevant portion of Para 21 of the report is extracted hereunder:-

" 21………..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 decision of this Court in New India Assurance Company v. Satpal Singh (2000) 1 SCC 237. The said decision has been overruled only in New India Assurance Company Limited v. Asha Rani & Ors. (2003) 2 SCC 223. We, therefore, are of 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……."

7. A close reading of Baljit Kaur (supra) reveals that the judgment in Asha Rani (supra) which was *passed on 03.12.2002 was to have a prospective effect. Since the position was uncertain because of the earlier decision of the Supreme Court in Satpal Singh (supra) it was observed that the Appellant National Insurance Company Limited would satisfy the award in favour of the claimant, if not already satisfied and recover the same from owner of the vehicle. It was not laid down as a proposition of law that even in the case of gratuitous passengers travelling in a goods vehicle, the Insurance Company will first pay the compensation awarded and would then recover from the insured.*

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9. In the case of gratuitous passengers travelling in a goods vehicle, there is no liability of the insurance company at all to pay the compensation, it is not required to prove any breach of the terms of the policy as the passengers travelling in the goods vehicles are not covered as the premium therefor is not paid by the insured. It is important to note that the judgment by the three Judges Bench in Swaran Singh (supra) was delivered on January 05, 2004 while judgment in Baljit Kaur (supra) was delivered on January 06, 2004. The Hon'ble Chief Justice presided over both the Benches with Hon'ble Mr. Justice S.B. Sinha being the common author in both the judgments. If the Supreme Court had any intention to make the Insurance Company liable to pay the compensation, it would have so mentioned in Baljit Kaur (supra) also."

11. Unfortunately, the Claims Tribunal had not gone into the aspect of Respondent no.1 travelling as a gratuitous passenger in a goods vehicle. Since risk under the insurance policy was not covered, the Appellant Insurance Company is not liable to pay the

compensation at all.

12. It may be noted that 70% of the awarded compensation was released in favour of Respondent no.1 by an order dated 22.01.2014 passed by the learned Predecessor Judge. The balance amount along with interest shall be refunded to the Appellant Insurance Company.

13. The Appellant will be entitled to recover the amount of compensation paid to Respondent no.1 from Respondents no.2 and 3 who are the driver, a tortfeasor and the person who permitted Respondent no.1 to travel in a goods vehicle and the owner and the insured.

14. The Appeal is allowed in above terms.

15. Statutory amount, if any, shall also be refunded to the Appellant.

16. Pending applications, if any, also stand disposed of.

(G.P. MITTAL)
JUDGE

MARCH 27, 2015
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