

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No. 1102 of 2003

Judgment Reserved on 03/01/2017

Judgment Delivered on 24 /03/2017

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1103 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1104 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1105 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1106 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1107 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1108 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1109 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1110 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1111 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

Misc. Appeal No. 1112 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

AND

Misc. Appeal No. 1113 of 2003

The New India Assurance Company Limited

Versus

Ashok Kumar Yadav and others

For Appellant : Shri Shreekumar Agrawal, Senior Advocate with
Shri Anand Gupta, Advocate
For Respondents : Shri Anand Shukla, Shri Goutam Khetrapal and
Shri C.K. Sahu, Advocates for the respective
respondents

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV JUDGMENT

1. This batch of miscellaneous appeals arise out of different claim petitions preferred by claimants connected with motor accident caused by use of one vehicle Truck No. M.P.24 C 2187. All the appeals are being decided by this common judgment.

2. The facts of the case admittedly are these, that the registered owner of the Truck bearing registration No. M.P.24 C 2187 was respondent No.2 and respondent No.1 was the driver employed by him. The appellant was arrayed in all the claim petitions as non-applicant Insurer and the remaining respondents in each case are the claimants. The Truck No. M.P.24 C 2187 was being plied on 09/11/2001, driven by respondent No. 1 met with an accident near Sendur Bapa under the jurisdiction of Police Station, Sakoli, District Bhandara (Maharashtra). It was alleged that the cause of accident was rash and negligent act of respondent No.1. The Truck was carrying passengers, out of them 12 persons namely Koushal, Vinod, Suko Bai, Budhara Bai, Janki Bai, Sewaram, Pemin Bai, Kunjalram, Udyan Singh,

Pritram, Naresh and Keshav expired as a result of this road accident. 12 persons namely Bisouharam, Ganeshram, Chhabilal, Siddharth, Dwarika Ram, Rishiram, Speshwari Bai, Komal Ram, Dhaneshwari Bai, Chandar Lal, Durga Bai and Narbad Bai were also injured in this road accident. 24 different claim petitions were presented before the Tribunal below claiming compensation as dependents of deceased and in capacity of injured in the accident.

3. All the claim petitions were heard and decided by the Tribunal below by a common order dated 30/08/2003, deciding the issues framed. It was held that all the deceased persons died in this accident and all the injured persons named as well got injured in the same accident because of negligent or rash driving by respondent No.1. It was held that the policy conditions of Insurance policy were breached by using the goods carriage vehicle as a passenger vehicle. The entitlement of award, liability and quantum was decided. Finally, the Tribunal below held that despite the breach of policy condition, the appellant-insurance company was under the liability to pay compensation to all the claimants and realize the same from the owner of the vehicle. On the basis of this finding it was ordered that the amount of claim as decided in each of the claim petitions was to be paid by the appellant and recovered from the owner of the vehicle respondent No.2.

4. The common question raised in each appeal is that the finding of the Tribunal below ordered despite breach of policy, that the appellant was under the liability to pay compensation to all the claimants and to recover thereafter from the registered owner is an erroneous and illegal finding. In appeal memo, one more ground was alleged that no issue was framed on

the point that whether the driver of the vehicle was in possession of legal and effective driving license at the time of accident or not? On these grounds it is prayed that the order in impugned award against the appellant be set-aside.

5. Counsel for the appellant has in submission given up the ground in appeal regarding non-framing of issue on the point of availability of legal and effective driving license in favour of respondent No.1. The only contention made and submitted is that the Tribunal below was not competent to order for 'pay and recover' the awarded amount in each case. Tribunal below has very clearly given this finding that the vehicle concerned was plied in breach of policy condition. So far as for the principle laid down regarding 'pay and recover' is certainly not applicable in case of passenger travelling in goods vehicle. No premium was paid for the passengers travelling in the goods vehicle. Hence there had been no contract of insurance for the same. On these grounds, appellant is entitled to be exonerated from the liability as saddled upon by the trial Court.

6. On behalf of the claimants, it is submitted that the insurance policy is admitted in this case, but the policy was not produced for perusal of the conditions mentioned and agreed between the parties. Hence, the breach as alleged cannot be ascertained. Further the appellant-insurance company has not pleaded as such in defence. For these reasons, the appeals have no merit.

7. The question for determination in these appeals is, whether the principle of 'pay and recover' as laid down in various judgments of the Apex Court is applicable in case of claim on behalf of deceased passenger or

injured passenger traveling in a goods vehicle. This question has to be decided fairly on the basis of principle laid down so far.

8. It was argued before the learned Tribunal that the accident took place after the enforcement of The Motor Vehicles (Amendment) Act, 1994. Reliance was placed on the judgment of Hon'ble Supreme Court in **New India Assurance Co. Shimla vs. Kamla and Others, (2001) 4 SCC 342**. It was decided on the basis of principle laid down in this case by the Supreme Court that appellant-insurance company was liable to pay the compensation as awarded and recover the same from the owner of vehicle.

9. The principle of pay and recover was laid down in the case of **National Insurance Company Limited v. Swaran Singh, 2004 AIR(SC) 1531** decided on 05/01/2004 which is quoted below :-

“**[105]** The summary of our findings to the various issues as raised in these petitions are as follows :

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Sections 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears as land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.”

In **National Insurance Company Limited v. Baljit Kaur, 2004 (2) SCC 1**, Hon'ble Supreme Court has held in para 2 and 21 which is quoted below :-

“[2] The question that arises for consideration in these appeals is whether an insurance policy in respect of a goods vehicle would also cover gratuitous passengers, in view of the legislative amendment in 1994 to Sec. 147 of the Motor Vehicles Act, 1988.

[21] 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 effect. The Tribunal as also the High Court had proceeded in terms of the decision 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 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 Sec. 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.”

10. Similar stand was taken by Hon'ble Supreme Court in **National Insurance Co. Ltd. v. Challa Bharathamma & Ors.**, 2004 8 SCC 517, decided on 21/09/2004. In this case the vehicle an auto rickshaw was being plied without requisite permit when it met with an accident. While deciding the appeal the principle of 'pay and recover' was reiterated for this case as well. In *Baljit Kaur* (supra) the principle of pay and recover was discussed with respect to gratuitous passenger in a goods vehicle whereas in *National Insurance Company Limited v. Swaran Singh* (supra) the principle was discussed with respect to the liability in case of breach of policy condition

regarding legal and effective driving license of the driver of the vehicle concerned. This position was further clarified in **Manager, National Insurance Co Ltd v. Saju P Paul and Another, 2013 (2) SCC 41**. Relying on the judgment of Apex Court in *Baljit Kaur* (supra) given by a Bench of three Judges and the judgment of *Challa Bharathamma* (supra) it was observed in paras 24 & 25 :-

[24] In *National Insurance Company Ltd. v. Parvathneni & Another* [SLP(C) .CC No. 10993 of 2009], the following two questions have been referred to the larger Bench for consideration:

(1) If an Insurance Company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.

(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142? Does Article 142 permit the Court to create a liability where there is none?"

[25] The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in *Baljit Kaur* 5 and *Challa Bharathamma* should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of *Challa Bharathamma*.

11. Appellant has placed reliance in *New India Assurance Co. Ltd. v. Asha Rani and others*, 2003 (2) T.A.C. 1 (S.C.) in which it was held that after the amendment of Motor Vehicle Act in 1994 the intention of legislature was clearly defined that there shall be no liability on insurer for passenger traveling in a goods vehicle. This judgment has been discussed in Swaran Singh's case (supra), Baljit Kaur's case (supra), Saju P Paul's case (supra).

12. Reliance has also been placed in judgment of co-ordinate Bench of this High Court in **M. A. (C) No. 1217 of 2008 Oriental Insurance Co. Ltd. v. Smt. Aghani Bai and others** decided on 17/12/2013, in which it was held that passenger in a goods vehicle is not covered under the insurance policy, hence the pay and recover policy for the same shall not be applicable. Another judgment of co-ordinate Bench in **M.A.(C) No. 589 of 2006 United India Insurance Co. v. Shiv Prasad Kashyap and others** decided on 14/01/2009 has given the same ratio of law.

13. In the case of **S. Iyappan V/S United India Insurance Company Ltd And Another**, reported in **2013 (7) SCC 62**, the Apex Court observed in paragraphs 24 & 25 as follows:

"24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi v. P. Sesh Reddy*, 1996 5 SCC 21.

25. The position can be summed up thus:
The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third

parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence. Learned counsel for the insured contended that it is enough if he establishes that he made all due enquiries and believed bona fide that the driver employed by him had a valid driving licence, in which case there was no breach of the policy condition. As we have not decided on that contention it is open to the insured to raise it before the Claims Tribunal. In the present case, if the Insurance Company succeeds in establishing that there was breach of the policy condition, the Claims Tribunal shall direct the insured to pay that amount to the insurer. In default the insurer shall be allowed to recover that amount (which the insurer is directed to pay to the claimant third parties) from the insured person."

14. In the case of **New India Assurance Company Limited V/S Asha Rani**, reported in **2003 (2) SCC 223**, the Apex Court observed as follows:

"8. Under the Motor Vehicles Act, 1939 the requirements of policies and limits of liability had been provided in Sec. 95. Proviso to Sec. 95(1) of the said Act unequivocally states that the policy shall not be required in case of a goods vehicle for passengers being carried in the said vehicle. In *Mallawwa v. Oriental Insurance Co. Ltd.*, (supra), while approving the earlier decision of the Court in *Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. (P) Ltd.*, 1977 (2) SCC 745, the Court construed the provisions of Sec. 95(1)(b) of the Motor Vehicles Act, 1939 and held that while the expression any person and the expression every motor vehicle are in wide terms but by proviso (ii) it restricts the generality of the main provision by confining the requirement to cases 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, therefore, the vehicle had to be a vehicle in which passengers are carried. The Court further held that the goods vehicle cannot be held to be a passenger vehicle even if the vehicle was found to be used on some stray occasions for carrying passengers for hire or reward. Undoubtedly, *Mallawwa* case (supra), was dealing with a situation under the Motor Vehicles Act, 1939.

9 In *Satpal* case (supra), the Court assumed that the provisions of Sec. 95(1) of the Motor Vehicles Act, 1939 are identical with Sec. 147(1) of the Motor Vehicles Act, 1988, as it stood prior to its amendment. But a careful scrutiny of the provisions would make it clear that prior to the amendment of

1994, it was not necessary for the insurer to insure against the owner of the goods or his authorised representative being carried in a goods vehicle. On an erroneous impression this Court came to the conclusion that the insurer would be liable to pay compensation in respect of the death or bodily injury caused to either the owner of the goods or his authorised representative when being carried in a goods vehicle the accident occurred. If the Motor Vehicles Amendment Act of 1994 is examined, particularly Sec. 46, by which the expression injury to any person in the original Act stood substituted by the expression injury to any person including owner of the goods or his authorised representative carried in the vehicle, the conclusion is irresistible that prior to the aforesaid Amendment Act of 1994 even if the widest interpretation is given to the expression to any person it will not cover either the owner of the goods or his authorised representative being carried in the vehicle. The objects and reasons of clause 46 also state that it seeks to amend Sec. 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression including owner of the goods or his authorised representative carried in the vehicle which was added to the pre-existing expression injury to any person is either clarificatory or amplification of the pre-existing statute. On the other hand, it clearly demonstrates that the legislature wanted to bring within the sweep of Sec. 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury. The judgment of this Court in Satpal case (supra), therefore, must be held to have not been correctly decided and the impugned judgment of the Tribunal as well as that of the High Court accordingly are set aside and these appeals are allowed. It is held that the insurer will not be liable for paying compensation to the owner of the goods or his authorised representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of the goods or his representative dies or suffers any bodily injury..

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26. In view of the changes in the relevant provisions in the 1988 Act visa-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 therefore.

15. Applicability of 'pay and recover' principle was distinguished in the case of **Branch Manager, United India Insurance Co Ltd V/S Nagammal; Unnamalai And V B Krishnan**, reported in **2009 ACJ 865**, by the full Bench of Madras Court observed as follows:

"5. Before considering the question, which is specifically in issue, in the present case, namely, whether the doctrine of pay and recover can be made applicable, it is first necessary to analyse in brief whether there is any requirement under Section 147 to cover the liability in respect of a passenger traveling in a goods vehicle.

6. A similar question arising under the Motor Vehicles Act, 1939, was considered in the decision (*Mallawwa and Ors. v. Oriental Insurance Co. Ltd. and Ors.*, 1999 AIR(SC) 589). There were several appeals under consideration. In some of the appeals before the Supreme Court, the deceased persons were the owners of the goods, who were accompanying the goods in goods vehicles, and, in some other appeals, the deceased persons were traveling as passengers in goods vehicles on payment of fare. The Supreme Court, while analysing the requirement of policies and limits of liability as envisaged under Section 95 of the Motor Vehicles Act, 1939, observed that the Insurance Company was not liable to cover the liability in respect of hirer of the goods traveling in a goods vehicle or a passenger traveling in a goods vehicle. In the said case, the Supreme Court approved the observation made by the Full Bench of the Orissa High Court in (*New India Assurance Co. Ltd. v. Kanchan Bewa*, 1994 AIR(Ori) 65) and also observed that the earlier decision of the Supreme Court in (*Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co.*, 1977 ACJ 343) was in consonance with the interpretation rendered by the Supreme Court.

18. Stage is now set to consider whether doctrine of "pay and recover" can be invoked in other cases, even though Section 149 is not as such applicable?

We have already noticed that in *Baljit Kaur's* case it was categorically held that the Insurance Company is not obliged to cover the liability in respect of a passenger traveling in a goods vehicle. Even though the doctrine of pay and recover as envisaged in Section 149(4) and 149(5) was not applicable, the Supreme Court, however, in the said case, applied the theory of pay and recover in the peculiar facts and circumstances as is apparent from the observations made by the Supreme Court

23. It is well settled that when the goods carriage vehicle is being used for the purpose of transporting passengers, it would amount to a violation of policy condition and in that event, the insurance company cannot be made liable to pay the compensation amount. This position is settled by series of decision of the Honourable

Supreme Court, referred to supra. Therefore, in the facts and circumstance of the case on hand, it is only the owner of the vehicle, who is liable to pay the compensation amount to the claimants, as determined by the Court below and the insurance company is not liable to pay the compensation amount. As far as quantum of compensation is concerned, it was not questioned by the owner of the vehicle in this batch of appeals. Therefore, this Court is not inclined to go into the correctness or otherwise of the quantum of compensation awarded by the Court below. Accordingly, the owner of the vehicle is directed to deposit the compensation amount, as determined by the Court below, with accrued interest, within a period of eight weeks from the date of receipt of a copy of this judgment."

16. In the case of **National Insurance Co Ltd V/S Prema Devi**, reported in **2008 (5) SCC 403**, the Apex Court observed in paragraphs 7 & 8 as follows:

"7. In **New India Assurance Co. Ltd. Vs. Vedwati and others**, it was held as under :

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"14. 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 therefor.

15. Our view gets support from a recent decision of a three-Judge Bench of this Court in **New India Assurance Company Limited v. Asha Rani and Ors.** (2002 (8) Supreme 594] in which it has been held that Satpal Singh's case (supra) was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award.

16. This position was also highlighted in **Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy and Others** (2003(2) SCC 339). Subsequently also in **National Insurance Co. Ltd. v. Ajit Kumar and Others** (2003(9) SCC 668), in **National Insurance Co. Ltd. v. Baljit Kaur and Others** (2004 (2) SCC 1) and in **National Insurance Co. Ltd. v. Bommithi Subbhayamma and Others** (2005 (12) SCC 243), the view in Asha Rani's case (supra) was reiterated."

8. Above being the position, the impugned order of the High Court is not sustainable and is set aside. It is open to the claimant to recover the amount awarded from the owners of the offending vehicles."

17. In view of the law laid down so far in case of passenger in a goods carriage vehicle, there being no contract between Insurer and the Insured in

this respect, the Insurer gets exonerated from the statutory liability, hence 'pay and recover' principle cannot be made applicable in such a case. The decision of the Tribunal below to direct the appellant to pay the compensation and recover it from the insured seems not to be in accordance with the principle laid down, hence impugned awards challenged in all these appeals need to be interfered with. Hence for the reasons aforesaid, the conclusion is arrived at. The appeals are allowed in part and the awards are modified. The order of 'pay and recover' passed against the appellant are set aside in all the awards. The compensation awarded in each claim case shall be recoverable from the owner and driver of the vehicle involved in the accident. No order as to costs.

Sd/-
(Rajendra Chandra Singh Samant)
JUDGE