

HIGH COURT of CHHATTISGARH, BILASPUR**MAC No. 927 of 2011**

1. Jagdish Ram Chandel S/o Premlal Chandel, R/o village Vikrampur, Thana Chhuikhadan, District Rajnandgaon (CG).
2. Chumman Lal S/o Jagdish Ram Chandel, R/o Villge Vikrampur, Thana Chuikhadan District Rajnandgaon (CG).

---- Appellants**Versus**

1. Dheerja Bai@ Geerja W/o Somlal Sahu, Aged about 37 years, R/o village Jurlakhurd, Thana Ghumka, Tehsil and District Rajnandgaon (CG).
2. National Insurance Co. Ltd. Branch Office, Kamathi Line, Rajnandgaon, Distt. Rajnandgaon (CG).

---- Respondents

For Appellants	:	Shri Arvind Shrivastava, Advocate.
For Insurance Company	:	Shri Dashrath Gupta, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy**Order On Board****03.11.2017**

1. The present appeal under Section 173 of the Motor Vehicles Act have been filed by the owner against the award dated 13.12.2010 passed by the Additional Motor Accident Claims Tribunal (FTC) Rajnandgaon (in short, the Tribunal) in Claim Case No.21/2010. Vide the said impugned award, the Tribunal applying the principle of pay and recovery had awarded a compensation of Rs.1,43,700/- to the claimant with liberty to the insurance company to initiate recovery proceedings against the appellant-owner.
2. The brief facts of the case is that the claimant in the instant case sustained injuries on account of accident that took place on 13.09.2009. The accident had occurred when the claimant was travelling on Tata Magic, a passenger vehicle, bearing registration

No.CG-04-T-4263. The doctor has certified her of suffering 40 percent disability. The offending vehicle was owned by the present appellant No.1 and was being driven by appellant No.2 and duly insured with respondent No.2. The reason for applying the principle of pay and recovery was on two counts; firstly, the driver at the relevant point of time was not having proper endorsement of his driving licence to drive a transport vehicle and secondly, the vehicle at the relevant point of time did not have a valid permit.

3. Shri Arvind Shrivastava, learned counsel for the appellant-owner submits that it is a case where the Tribunal has wrongly applied the principle of pay and recovery. According to appellant, the alleged two breach of policy conditions were required to be pleaded and proved by the insurance company which they have not effectively proved. Therefore, the finding of pay and recovery is bad in law. It was further contended that the insurance company also did not lead any suggestive question or have made any specific cross objection on the issue of the driver not having proper endorsement as well as the owner not having permit and on this ground also the findings arrived at by the Tribunal is erroneous.
4. It was next contended that the witness who has been examined on behalf of the insurance company has categorically deposed before the Tribunal that while issuing policy it was necessary for the officer of the insurance company to have ensured that the vehicle does have proper permit and registration. So also the driver had proper valid licence while issuing the policy and if the insurance company failed to

ensure the conditions required, the insurance company cannot be absolved of its liability of indemnifying the owner.

5. It was also the contention of the appellants that the nature of breach which is alleged also is not so fundamental by which the accident could be attributed upon the appellant No.2-driver. Further, the insurance company has not discharged its burden of proof so far as the breach of policy conditions is concerned. Lastly it was also contended that the vehicle involved in the accident was stationery on the date of accident as it was for repairing purpose put up in a garage. Thus, prayed for setting aside of the finding of pay and recovery and fastening the entire liability on the insurance company. He relied upon the decision of Supreme court in case of Lakhmi Chand Vs. Reliance General Insurance, 2016(3) SCC 100 and Divisional Manager, Shri Ram General Insurance Co.Ltd. Vs. Til Gadiya & Ors. 2014 (2) CGLJ 308.
6. Counsel for respondent insurance company however opposing the appeal submits that in the instant case the facts which have come before the Tribunal by itself is so explicit that the vehicle in the instant case did not have a permit for operating it as a transport vehicle which is a clear breach of policy conditions, so also it is a breach of provisions of the MV Act. That, once when this factum of the case stands established, the order passed by the Tribunal does not warrant any interference. The appellant cannot be granted advantage of plying the vehicle in utter disregard to the provisions of the MV Act, so also in contravention to the conditions to the insurance policy and

yet they be exonerated by indemnifying the insurance company. He relied upon the judgment of Supreme Court in case of National Insurance Co.Ltd. Vs. Challa Bharathamma & Ors., 2004(8)SCC 517 as also Division Bench judgment of Kerala High Court in case of Suresh Kumar Vs. Oriental Insurance Co.Ltd.& Ors. 2016 ACJ 679 and thus prayed for rejection of the appeal.

7. Having heard the rival contentions put forth on either side and on perusal of records, some of the admitted factual matrix of the case is that the accident did occur involving the vehicle Tata Magic No.CG-04-T-4263 owned by the appellant No.1 and driven by the respondent No.2 on 13.09.2009, the claimant respondent No.1 sustained injuries on her right hand is also not in dispute. The vehicle being insured with the respondent No.2 also is an admitted position.
8. In the given factual matrix of the case, now the only issue left is whether in the light of pleadings and evidence which have come on record, the order passed by the Tribunal is just, reasonable and proper or not.
9. The bone of contention is whether the finding of the Tribunal of pay and recovery for the alleged two breach is proper, legal or not.
10. As regards the first breach that of driver of the offending vehicle i.e. appellant No.2 not having proper endorsement on his licence permitting him to drive a transport vehicle is concerned, the said issue is no longer res integra as it stands concluded by the authoritative decision of the larger Bench decision of Supreme Court in case of Mukund Dewangan Vs. Oriental Insurance Co.Ltd., AIR

2017 SC 3668 whereby it has been conclusively held that there is no requirement for such endorsement in case if the driver has a proper valid licence in respect of same category or class of the vehicle. In the instant case the driver admittedly had a licence to drive light motor vehicle (NT). The vehicle involved in the accident i.e. Tata Magic passenger vehicle is also a light motor vehicle. The laden weight of the vehicle also is less than 3000 kg.

11. On the aforesaid factual matrix of the case, this court has no hesitation in holding that the argument of the appellant thus have sufficient force to reach to conclusion that mere fact of the driver of the offending vehicle not having proper endorsement to drive a light motor vehicle (T) would by itself would not absolve the insurance company of its liability from indemnifying the owner. The finding thus stands set aside.
12. So far as the second breach i.e. the vehicle at the relevant point of time not having a valid permit is concerned, if we look into the decision which have been cited by the counsel for the appellant, the case of Lakhmi chand (Supra) is one where the alleged breach of policy conditions was to the extent of the vehicle carrying more number of passengers than the permitted sitting capacity of the motor vehicle. In the said judgment, the Supreme Court relying upon its earlier judgment in case of B.V. Nagaraju Vs. Oriental Insurance Co.Ltd.,Divisional Office, Hassam, 1996(4)SCC 647 has observed that the said breach of merely carrying more passengers than the permitted sitting capacity does not amount to fundamental breach of

the terms of the policy conditions so as to allow the insurer to eschew its liability. Further, relying upon the judgment in case of National Insurance Co. Ltd. Vs. Swaran Singh & Ors. 2004(3)SCC 297, the counsel referred to the observations of the Supreme Court holding that the Supreme Court has emphasized the fact that in order to avoid the liability, the insurance company must not only establish the defence claimed, but also establish breach on the part of the owner and for which burden of proof rests upon the insurance company.

13. So far as case of Til Gadtiya (Supra) is concerned, there the appeal was that of an insurance company which had challenged the fastening of liability upon the insurance company whereas, present is an appeal by the owner where the order of pay and recovery is under challenge, and therefore, the ratio of law laid down in the said judgment cannot be applied in the straight jacket formula in the present case.

14. What is pertinent to take note of at this juncture is that, though the owner and driver were represented before the Tribunal. They entered appearance, filed their written statement and have also adduced their evidence, but have not produced the permit which the appellant No.1 was supposed to have, before the Tribunal with which they could have easily stated that the vehicle was in proper condition and that the owner has abided by all the conditions to the policy as also to the provisions of the Motor Vehicles Act. The appellants are simply trying to put burden upon the insurance company or cast an allegation against the insurance company of not discharging their duty of

proving the case.

15. What is also more relevant at this juncture is to take note of the fact that inspite of Tribunal ordering for pay and recovery in favour of the insurance company and the present appeal being filed by the owner, even in the present appeal the owner does not try to discharge his duty by producing the most relevant document i.e. permit, which if he has, so as to discharge his liability. In the absence of the owner not producing the same both before the Tribunal as well as in the present appeal, forces this court to draw a conclusion that the appellant did not have a valid permit at the relevant point of time.

16. If we look into the decision in case of Suresh Kumar (Supra), the Division Bench of Kerala High Court in paragraphs 18 & 19 has held as under :

“18. As the Apex Court in Bijaya C. Tripathy's case, AIR 2005, SC 1431, was of the view that what is prevented under Section 66 of the Act is the use of the vehicle as a transport vehicle without a permit an it dos not prohibit plying of such a vehicle on public road, the same principle will apply herein also. It was also held therein that the vehicle can be driven in a public road so long as it is not used as a transport vehicle. The Apex court categorically held that an owner of such a vehicle may use the vehicle for taking his family out for a picnic, etc. and Section 66 will not bar such a use.

19. Judged in the light of the above principle, we are of the view that the facts proved in this case will definitely show that the vehicle was not used as a transport vehicle. Therefore, the absence of permit will not result in any violation of the conditions of policy, as contended by the learned Senior Counsel for the insurance company. As held by this court in Sethunath's case, 2011 (1) KLT 222 also, the prohibition is limited to the use of the vehicle as a transport vehicle without a valid permit.”

17. So far as the factual matrix of present case is concerned, there is sufficient material to show that the vehicle at the relevant point of time was being used for hire and reward and that this evidence is

sufficient to establish that the offending vehicle was being used as transport vehicle. Since admittedly when the vehicle was being used as transport vehicle, it becomes mandatory for the owner to have proper permit for using the vehicle as transport vehicle. There is no evidence which have come on record to show that the vehicle at the relevant point of time was not being used for transport purpose.

18. In the given facts, the findings of the Kerala High Court in case of Suresh Kumar (Supra) would squarely apply in the facts of the present case.
19. Relying upon the decision of Supreme Court in case of State of Orissa Vs. Bijaya C. Tripathy (Supra), though under the law the owner is prevented from using the vehicle as transport vehicle without permit. Likewise, in case of Chhalla Bharathamma (Supra) the Supreme Court referring to Sections 66 and 149 (2)(a)(i)(c) of the MV Act dealing with such a situation has in paragraphs 12 and 13 held as under:

“12. 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 at 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 insurer. High Court was, therefore, not justified in holding the insurer liable.

13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned 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. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured.”

20. In the given factual matrix of the case, where the owner inspite of having sufficient opportunity both before the Tribunal and again before this court in appeal, where the appeal was filed by the owner himself has not been able to produce document i.e. permit which he otherwise was supposed to have, forces this court to draw an adverse inference against the appellant-owner. Thus, keeping in view the principles laid down by the Supreme Court in case of Chhalla Bharthamma (Supra) this court does not find fault with the impugned award of the Tribunal.

21. The appeal of the owner thus being devoid of merit deserves to be and is accordingly rejected.

SD/-
(P.Sam Koshy)
Judge