

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH

FAO No.5232 of 2010

Date of Decision.04.08.2017

State of Haryana and othersAppellants

Vs

Jagdev Singh and othersRespondents

2. **FAO No.123 of 2011**

Jagdev Singh and anotherAppellants

Vs

Harbans Singh and othersRespondents

Present: Mr. Sandeep Moudgil, Addl. A.G., Haryana
for the appellants in FAO No.5232 of 2010 and
for respondent Nos.3 to 5.

Mr. Dheeraj Narula, Advocate
for the appellants in FAO No.123 of 2011 and
for respondent Nos.1 and 2 in FAO No.5232 of 2010.

Ms. Vandana Malhorta, Advocate
for respondent Nos.3 and 4.

Mr. P.K. Ganga, Advocate
for respondent No.5.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J.(ORAL)

This order of mine shall dispose of two appeals bearing Nos.5232 of 2010 filed by the State of Haryana and another is FAO No.123 of 2011. The former is challenging the liability and the latter is for enhancement of compensation by the claimants.

The case stated before the Tribunal is that the deceased-Shamsher Singh @ Raju, aged 17-18 years, being a student and was allegedly working as helper with a Carpenter, had boarded a bus bearing

registration No.HR-57/1384 owned by Haryana Roadways insured with ICICI Lombard indemnifying the owner. The Tribunal had absolved the liability of the insurance company on the ground of alleged breach of terms and conditions of the insurance company and awarded a compensation to the tune of ₹3,09,000/- by taking the income of the deceased as ₹3600/- per month, applying a multiplier of 16 and deduction of 1/3rd.

Mr. Sandeep Moudgil, Addl. A.G., Haryana appearing on behalf of the State in FAO No.5232 of 2010 submits that the insurance company had failed to prove on record the insurance policy except by tendering insurance policy by suffering a statement dated 08.03.2010 as reflected in the zimni order dated 08.03.2010 of the Tribunal.

He further submits that students sat on the roof of the bus driven by the driver, though in examination-in-chief it has been categorically stated that the driver and conductor did not permit them to sit on the roof and even request was made to come down but they did not alight the bus and therefore, all preventive measures which the driver could take, had been taken and in this respect, the insurance company cannot be absolved from the liability. In support of his contention relies upon judgment of Division Bench of this Court in **The Oriental Insurance Co. Ltd. Vs. Smt. Meena Devi and others 2014 ACJ 17.**

He further submits that vide order dated 08.03.2010, the insurance company had only appended the policy i.e. first page and not the other pages. The first page of the policy had mentioned about the carrying capacity of the vehicle insured as 52 passengers. This aspect has not been noticed by the Tribunal and therefore, finding on issue No.1 is liable to be modified and the liability should have been fastened on the insurance

company. The Tribunal has grossly erred in granting the recovery rights to the insurance company.

In the appeal bearing No.123 of 2011, the claimants have sought enhancement of compensation on the premise that admittedly, the deceased was 17-18 years old and instead of multiplier of 16, it should have been 18. No compensation has been assessed for loss of love and affection, much less, the funeral expenses are also very meager, therefore, the amount of compensation is required to be increased. The Tribunal should have taken the income of the deceased more than ₹3600/- as he was a Helper with the Carpenter.

Ms. Vandana Malhotra, learned counsel appearing on behalf of the insurance company submits that there is breach of terms and conditions of the insurance policy as in case of any passenger found sitting outside the bus i.e. atop the bus, the insurance company is required to be absolved. In support of her contention, relies upon the judgment of Division Bench of Karnataka High Court in **Karnataka State Road Transport Corporation Vs. Lakkappa Hiremanappa Lamani and others 2005 ACJ 1981** whereby the liability to the extent of 80:20 i.e. contributory negligence viz-a-viz the claimant had been apportioned. However, in the other judgment rendered by the Himachal High Court in **HRTC Vs. Rajesh Kumar and others 2006 (41) AIC 733**, the contributory negligence was apportioned to the extent of 50%.

In order to lend support to her contention, she has drawn attention of the Court to the statement of driver, RW-1 Harbans Singh that once passengers were repeatedly requested to come down and refused, they have taken the risk of travelling and travelled on the roof of the bus at their

own peril.

I have heard learned counsel for the parties and appraised the paper book. With respect and humility, I do not agree with the judgment rendered by Division Bench of this Court referred to above, as it was a case based upon the facts and circumstances, though had an occasion to deal with judgment rendered by the Single Bench in *The New India Assurance Co. Ltd. Vs. the Samundri Roadways Co. Pvt. Ltd. and others (1984) PLR 689* and *New India Assurance Co. Ltd. Vs. Punjab Government and others (1989-2) PLR 568* but in view of the ratio decidendi culled out by Hon'ble Supreme Court in *National Insurance Co. Ltd. Vs. Anjana Shyam and others 2007(7) SCC 445* the view expressed is that the insurance company cannot indemnify the owner more than 42 passengers, however, in the instant case undertaken the indemnification of 52 passengers. The conceded position on record is that the passengers were travelling on the roof of the bus. For the sake of brevity, statement of RW-1 Harbans Singh reads as under:-

“Statement of Harbans Singh son of Amar Singh, aged 57 years, Driver in Haryana Roadways, Sirsa Depot, Sirsa resident of village Aboobshahar, District Sirsa on S/A.

On 12.09.2007, I was driver of Haryana Roadways bus No.HR-57/1384 and this bus was enroute from Dabwali to Sri Ganganagar on that day. I started this bus from Dabwali at 6.20 AM for Ganganagar. When the bus reached near Village Chautala after boarding the passengers I startd against on the whistle of the conductor. When I covered 2 KM and reached near the Mandir, a traula came from the opposite side and the

driver of the said traula was driving it in a zig zag manner and at a high speed. When the bus crossed the Mandir, a branch of the tree hit some passenger sitting on the roof of the bus and on the whistle of the conductor, I again stopped the bus. I was driving the bus as per traffic rules and on seeing the traula, I took my bus on the kacha berm of the road on left side. Two passengers sustained injuries and they both were shifted to Govt. Hospital Sangaria in the same bus. Some students had sit on the roof of the bus but I do not know how and when they climbed and what was their number. I did not make any report to the police. We tried three times to get the boys down from the bus top but they did not accede to our request and rather they attempted to assault us.

xxxn by Shri V.S. Sra, counsel for respondents No.1 and 2.

I have not received summons of this case for today. Volunteered I was directed by a Clerk of the Roadways Department to attend the Court. I do not recollect the name of the that Clerk. I start and stop bus as whistle signals given by the Conductor. There was about 50/52 passengers in the bus. Some were standing and some were sitting. Volunteered the bus was not over-loaded.

xxxn by Shri B.C. Bhatiwala, counsel for petitioners.

A criminal case for causing this accident is pending in the court against me and conductor Sahab Ram in which charge has already been framed and the case is listed for prosecution evidence. I do not know whether passengers had

climbed on the top of the bus on the instructions of the bus conductor. It is incorrect to suggest that the accident occurred due to my negligence. It is also incorrect to suggest that I have deposed falsely. It is incorrect to suggest that no effort was made by us to ask passengers sitting on the bus top to come down. It is incorrect to suggest that the passengers had not sit on the top of the bus as per their wishes. It is incorrect to suggest that they had sit on the instructions of the conductor.”

From the perusal of the same, it is evident that the driver had insisted upon, rather exhorted on the deceased and other passengers not to travel on the roof but they did not budge, resulting into the accident owing to have been hit by branch of the tree. In my view, the Tribunal ought to have fastened the liability to some extent on the deceased, now being represented by the claimants.

In view of the ratio decidendi culled out in the judgment of Hon'ble Supreme Court in Anjana Shyam's case (supra) in paragraphs 12, 13, 14 and 18, I am of the view that the recovery rights have rightly been given to the insurance company to recover the amount awarded by the Tribunal. As per the provisions of Section 149 of the Motor Vehicles Act, the insurance company is entitled to take all the defences available but it has to discharge the liability, thus, the recovery rights given to the insurance company are perfectly legal and justified and do not call for interference.

However, the finding of not attributing any contributory negligence on the part of the deceased is liable to be modified in view of the ratio decidendi culled out by Himachal Pradesh High Court in HRTC Vs.

Rajesh Kumar and others (supra). Para 10 of the judgment reads as under:-

“10. In the facts of the present case, in my opinion, the deceased was primarily negligent in climbing on to the roof of a moving bus. However, the driver and conductor of the bus cannot also say that they were not totally at fault. There was an option with the driver to have stopped the vehicle and not driven it till all the persons got down from the roof of the bus. Therefore, in my opinion both, the bus driver and the deceased equally contributed to the accident. The appellant is, therefore, entitled to mitigation of damages to this extent.

A conjoint reading of the ratio decidendi culled out supra and the statement of the driver leads to irresistible conclusion that the deceased had travelled on the top of the roof at his own peril and therefore, in my view, the Haryana Roadways has to be compensated in this regard. Resultantly, I apportioned the liability in the ratio of 50:50 i.e. 50% on the Haryana Roadways and 50% on the deceased.

Now coming to the enhancement of compensation, I am of the view that a multiplier of 18 should have been applied instead of 16 where the deceased was 17-18 years old and deduction should have been half instead of 1/3rd. Besides, this I will also provide ₹50,000/- to each one of the parents towards loss of love and affection, ₹5000/- for loss to estate and ₹25,000/- for funeral expenses. In total, there shall be a compensation of ₹5,18,800/-. However, in view of my finding rendered above, the compensation payable shall be Rs.2,59,400/- owing to contributory negligence attributed to the deceased to the extent of 50%. The Tribunal has awarded as sum of ₹3,09,000/-.

In the aforementioned eventuality, the insurance company will have a right to recover 50% of the amount of compensation from the

Haryana Roadways to the extent of 50% i.e. ₹1,29,700/- and in case, the insurance company has discharged the entire liability, they are entitled to recover the amount over and above ₹1,29,700/- from the claimants with interest as awarded by the Tribunal.

The award passed by the Tribunal stands modified. Resultantly, the appeal filed by the State in FAO No.5232 of 2010 is allowed and the appeal filed by the claimants in FAO No.123 of 2011 is dismissed.

(AMIT RAWAL)
JUDGE

August 04, 2017
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	Yes