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

FAO No.5201 of 2012
Date of Decision.15.11.2017

Sunder Singh ....Appellant

Vs

Smt. Sharda Devi and others ....Respondents

Present: None for the appellant.

Ms. Vandana Malhotra, Advocate
for the insurance company-respondent No.4.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

-.-

AMIT RAWAL J.(ORAL)

The appellant-owner is in appeal seeking modification of the award *viz-a-viz* the recovery rights granted to the insurance company on account of the fact that the three wheeler owned by him bearing registration No.HR-38P-6893 insured with the Future General Insurance Company Limited was found to be applied in breach of terms and conditions of the insurance policy.

The case set up by the appellant-owner is that the vehicle was being plied for carrying passengers being a three wheeler and the route permit Ex.R5 was issued for plying the vehicle in the area of Municipal Corporation, Ballabgarh but the Tribunal has committed illegality and perversity in noticing the fact that the accident had taken place beyond the limits of Ballabgarh and therefore, the terms and conditions of the insurance policy have been violated. In this regard, attention of the Court has been drawn to sub-section 2 of Section 149 of the Motor Vehicles Act and the judgment rendered by this Court in ***National Insurance Company Limited***

Vs. Kamlesh Kaur and others 2006(3) RCR (Civil) 634 to urge that the defences available to the insurance company is only if the vehicle was found to be plied for purpose other than what the permit allowed, thus, the finding to that extent is liable to be modified.

Per contra, learned counsel appearing on behalf of the insurance company relies upon the law laid down by the Hon'ble Supreme Court in ***National Insurance Company Ltd. Vs. Chella Bharathamma 2004(8) SCC 517*** to contend that using of vehicle without permit would be a breach of terms and conditions of the insurance policy, therefore, the insurance company is liable to be exonerated.

I have heard learned counsel for the insurance company and of the view that the finding given by the Tribunal providing recovery rights to the insurance company is not correct appreciation of law. The finding given by the Tribunal in Para Nos.33 and 34 is reproduced as under:-

> *"33. However, the respondent-insurance company has been able to establish that respondent no.1 was driving the three wheeler in question at the time of accident beyond the permitted area of its operation. Ex.R5 is the copy of the route permit of three wheeler No.HR-38P-6893. As per this route permit this vehicle was allowed to carry on passengers on hire. The route/area of its operation was the area of Municipal Corporation, Ballabgarh. This accident has taken place in the area of village Dayalpur. The First Schedule appended to the Haryana Municipal Corporation Act, 1994 shows that the Municipality of Faridabad/Township, Municipality of Faridabad Old, Municipality of Ballabgarh and Revenue Estate of Ballabgarh not included in the municipality of Ballangarh shall from the part of Faridabad Complex. Para-B of the First Schedule is the lit of the Sabha areas included in Faridabad Complex. Village Dayalpur does*

not fall in the said list. This fact has not even been disputed at bar that village Dayalpur does not fall within the area of Municipal Corporation, Ballabgarh/Faridabad by learned counsel for respondents No.1 and 2. Rather, he has contended that at the time of accident, there was no passenger in the vehicle and the said vehicle was being taken to the residence of respondents and for this type of operation, the route permit is not required.

34. The respondent-insurance company has established that at the time of accident, the three wheeler in question was being operated beyond the permitted area of its operation. So, the burden has shifted upon the respondents No.1 and 2 to establish the exception to the necessity of the rout permit. There is absolutely no plea in the written statement filed by respondents No.1 and 2 that at the time of accident, the three wheeler in question was carrying no passenger and was being taken to the house of the respondents. Respondents No.1 and 2 have also not stepped into the witness box to prove this fact. So, the contentions raised by learned counsel for respondents No.1 and 2 are totally beyond pleadings and even no evidence has been adduced to prove this plea. Thus, this contention raised by learned counsel for respondents No.1 and 2 deserves outright rejections. Moreover, the accident has taken place on 21.5.2010 at 12.00 PM. It is not believable that at such a time the three wheeler in question would have been being taken to the house of the respondents. That is the peak hour for such type of vehicle to earn the money by transporting the casual passengers. Thus, it is established that at the time of accident, the three wheeler in question was being operated in the area of village Dayalpur beyond the permitted area of its operation."

No doubt, the ratio decidendi culled out by Hon'ble Supreme Court in ***Chella Bharathamma's case*** (supra) is not in dispute but the fact remains that simple and plain language of sub-section 2 (c) of Section 149 of the Motor Vehicles Act reveals that the insurance company can take up the defence enshrined therein i.e. where the vehicle is being used for the purpose other than the permit allowed. In the instant case, the permit was issued for carrying passengers on hire in the area of Municipal Corporation, Ballabgarh but the accident was found to have been occurred at different place, thus, it would not lie in the mouth of the insurance company that there was a breach in terms and conditions of the insurance policy but would be in domain of the concerned authority which had granted the permit or registered the vehicle. Three wheeler is meant for carrying passengers and therefore, the Registration Certificate had also been issued in this regard. It was not the case of the insurance company that the vehicle was being plied for the purpose other than what the permit allowed i.e. it was being used for transporting goods and not passengers. The Hon'ble Supreme Court after interpreting the provisions of sub-section 2 of Section 149 in ***Kamala Mangalal Vayani and others Vs. United India Insurance Co. Ltd. and others 2010 ACJ 1441*** has held as under:-

> "*4. As noticed above, the owner-cum-driver had remained ex parte. Once it was established that the vehicle was comprehensively insured with the insurer to cover the passenger risk, the burden to prove that it was not liable in spite of such a policy, shifted to the insurer. The claimants are not expected to prove that the vehicle had a valid permit, nor prove that the owner of the vehicle did not commit breach of any of the terms of the policy. It is for the insurer who denies its liability under the policy, to establish that in spite of the Comprehensive Insurance Policy issued by it, it is not liable on account of the requirements of the policy not being fulfilled. In this case, the insurer produced a certified copy of the proceedings of the Registering Authority and Assistant Regional Transport Authority, Bangalore dated 7.7.1990 to show that the application for registration of the vehicle filed*

by the respondent No.3, was rejected with an observation that it was open to the applicant to apply for registration in the appropriate class. But that only proved that on 7.7.1990, the vehicle did not have a permit. But that does not prove that the vehicle did not have a permit on 27.7.1990, when the accident occurred. It was open to the insurer to apply to the concerned transport authority for a certificate to show the date on which the permit was granted and that as on the date of the accident, the vehicle did not have a permit, and produce the same as evidence. It failed to do so. The High Court committed an error in expecting the claimants to prove that the vehicle possessed a valid permit. We are of the view that there was no justification for the High Court to interfere with the judgment and awards of the learned Tribunal in the absence of relevant evidence."

In view of the law laid down by Hon'ble Supreme Court in ***Kamala Mangalal Vayani's case*** (supra), the finding given by the Tribunal giving recovery rights to the insurance company is not sustainable and hereby modified, in essence, the insurance company is not absolved and shall indemnify the insured as per terms and conditions of the insurance policy.

The award passed by the Tribunal is modified to the above extent and the appeal stands allowed in the above terms.

(AMIT RAWAL)
JUDGE

November 15, 2017
Pankaj*

Whether reasoned/speaking	Yes
Whether reportable	No