**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision: 24.8.2017

1. **FAO No.4290 of 2014(O&M)**

Data Ram and another …..Appellants

VERSUS

TATA AIG General Insurance Co. Ltd. and others .....Respondents

Present: Mr. Balraj Gujjar, Advocate for the appellants.

Mr. Rajesh K. Sharma, Advocate for respondent No.1.

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2. **FAO No.5406 of 2012(O&M)**

TATA AIG General Insurance Co. Ltd. …..Appellant

VERSUS

Dev Karan and others .....Respondents

Present: Mr. Rajesh Kumar Sharma, Advocate for the appellant.

Mr. Balraj Gujjar, Advocate for respondents No.5 and 6.

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CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

REKHA MITTAL, J.

This order shall dispose of FAO No.5406 of 2012 and 4290 of 2014 as these have emerged out of the same award dated 19.05.2012 passed by the Motor Accidents Claims Tribunal, Gurgaon (in short 'the Tribunal') whereby compensation has been awarded in regard to death of Rahul @ Kalu in a motor vehicular accident that took place on 01.02.2011 due to rash and negligent driving of tractor No.RJ-02-RB-4322, driven by Data Ram Gurjar.

The Tribunal assessed compensation to the tune of Rs.3,21,800/- to be shared by parents of the deceased (claimants No.1 and 2) equally, held to be payable jointly and severally by the driver and owner of the offending vehicle but the insurance company was directed to pay compensation to the claimants with right of recovery against the driver and owner of the offending vehicle.

FAO No.5406 of 2012 has been preferred by the Insurance Company whereas FAO No.4290 of 2014 has been preferred by driver and owner of the offending vehicle primarily to assail the findings of the Tribunal on issue No.4.

For facility of reference, the Insurance Company shall be referred as the 'company' whereas the driver and owner would be referred as 'respondents'.

Counsel for the company would urge that as the deceased was travelling on mudguard of offending vehicle, he was a gratuitous passenger, therefore, the insurance company cannot be fastened with liability to pay compensation. In support of his contention, he has relied upon judgments of Hon'ble the Supreme Court of India **New India Assurance Co. Ltd. Vs. Asha Rani, 2003(1) RCR (Civil) 671**, **National Insurance Company Vs. Kaushalya Devi and others, 2008(4) RCR (Civil) 902**. Further reference has been made to judgment of this Court **United India Insurance Company Vs. Ramji Lal and others, 2010(33) RCR (Civil) 19**.

Counsel representing the respondents, on the other hand, would contend that the insurance company cannot avoid its liability to pay compensation to the claimants even if findings of the Tribunal that the deceased was a gratuitous passenger are upheld. However, he has assailed findings of the Tribunal that the alleged offending vehicle was being used for commercial purpose transporting iron, cement etc., held in para 30 of the award. To bring home his contention, it has been argued that Gada Ram son of Ram Chander another traveller on the mudguard of the tractor tendered into evidence his affidavit by way of examination in chief. In the opening para of his affidavit, he has reiterated that his brother Kailash is running building material business at village Jharsa, District Gurgaon and he had sent intimation at home that there are some tin etc. and bring a tractor and take the tin etc at home to make a Chhappar. It is further argued that in view of deposition of Gada Ram, findings recorded by the Tribunal that the tractor was being used for commercial purpose cannot be allowed to sustain and liable to be set aside.

In support of his contention with regard to liability of the insurance company to pay to the claimants, he has relied upon judgment of Hon'ble the Supreme Court **The New Indian Assurance Company Ltd. Vs. Darshana Devi and others, 2008(2) RCR (Civil) 86**. Further reference has been made to judgment of this Court **The New India Assurance Co. Ltd. Vs. Vide Devil, 2001(4) RCR (Civil) 46**.

I have heard counsel for the parties, perused the paper-book particularly the award passed by the Tribunal.

Indisputably, Rahul @ Kalu was travelling on mudguard of the tractor (the offending vehicle). Gada Ram in his affidavit has deposed that Rahul @ Kalu son of his brother in law who used to reside with them asked him to go with them to see Gurgaon and as such driver Data Ram told to take him. Testimony of Gada Ram at whose behest FIR No.36 dated

02.02.2011 under Sections 279, 304-A IPC was registered with police Station Sadar, Gurgaon against Data Ram is sufficient to affirm the findings of the Tribunal that Rahul @ Kalu – deceased was a gratuitous passenger travelling on the mudguard of tractor which is not meant for carrying passengers. Counsel for the respondents has not disputed that policy issued by the insurance company under Section 147 of the Motor Vehicles Act, 1988 (in short 'the Act') would not cover liability qua a gratuitous passenger as has been consistently held by Hon'ble the Supreme Court. The judgment cited by counsel for the insurance company supports the view that the insurance company is not liable to pay for injury or death of a gratuitous passenger under an Act Policy though after the amendment in the year 1994 the policy would cover owner of goods or his representative travelling in a goods vehicle. In this view of the matter, findings of the Tribunal that the insurance company is not liable to pay compensation in regard to a gratuitous passenger are liable to be affirmed and ordered accordingly.

To be fair to counsel for the respondents, he has referred to judgment of this Court in **Vide Devil's case** (supra) wherein the deceased was travelling on mudguard of tractor as a gratuitous passenger. This Court by relying upon judgment of Hon'ble the Supreme Court **New India Assurance Co. Vs. Satpal Singh, 2000(1) RCR (Civil) 274** negated plea of the insurance company that the insurance company is not liable to pay compensation. The judgment in **Satpal Singh**'s case (supra) was over-ruled by Hon'ble the Supreme Court of India in **Asha Rani's case** (supra), as such, the respondents cannot derive any advantage to their contention from what has been held by this Court in **Vide Devil's case** (supra).

The Tribunal has held that the insurance company is not liable to pay compensation as the deceased was a gratuitous passenger sitting on mudguard of the tractor. It has examined the matter from another angle that since the tractor in question was being used for commercial purpose transporting iron, cement etc, no liability can be fastened on the insurance company. The Tribunal has not adverted to statement of Gada Ram while recording its findings that the tractor was being used for a commercial purpose.

Counsel for the insurance company has not made any submissions to counter contention of the respondents that the tractor was used for carrying tins etc for the purpose of making a Chhappar. Taking into consideration testimony of Gada Ram and in absence of any rebuttal to his statement in this regard, findings recorded by the Tribunal that the tractor was being used for commercial purpose for transporting iron, cement etc. cannot be allowed to sustain and liable to be set aside. Despite setting aside findings of the Tribunal qua user of the vehicle for commercial purpose, it would not create any liability against the insurer for the reason that the deceased was a gratuitous passenger.

This brings the Court to the question whether in the circumstances insurance company can be directed to pay compensation to the claimants by keeping its right of recovery intact.

In **Kaushalya Devi's case** (supra), Hon'ble the Supreme Court while allowing the appeal of the insurance company has held in the concluding para that if the amount deposited by the insurance company has since been withdrawn by the first respondent/claimant, it would be open to the insurance company to recover the same in any manner specified by the

High Court but if the same has not been withdrawn, the deposited amount may be refunded to the insurance company and the proceedings for realisation of the amount may be initiated against owner of the vehicle. Meaning thereby that the insurance company was totally exonerated of its liability to pay compensation. Similarly, a Division Bench of this Court in **New India Assurance Co. Vs. Smt. Santra Devi and others, 2006(4) RCR (Civil) 316** by relying upon judgment of Hon'ble the Supreme Court **National Insurance Co. Ltd. Vs. Bommithi Subbhayamma, 2005(4) RCR (Civil) 829** has held that the insurance company is not liable to pay compensation in respect of gratuitous passengers which were neither contemplated at the time of contract of insurance was entered into nor was any premium paid for extension of benefit of insurance to that category of people. A Single Bench of this Court in **Ramji Lal and others case** (supra) has allowed appeal of the insurance company by setting aside the award passed by the Tribunal and held that the pay and recovery should be applied only to situation where the claim is by a third party/workman and it is fully covered by the requirements of compulsory insurance under Section 147. If the Act does not require a policy to be taken for a traveller other than driver of a tractor or to cover third party risk, it means that there is no requirement of insurance at all and the question of making liable the insurer to pay and recover under Section 149(4) proviso or under Section 149 (5) of the Act does not arise.

In the judgment **Darshana Devi and others case** (supra) relied upon by the respondents, the Insurance Company was exonerated of its liability to pay compensation but still directed to pay compensation to the claimants with a right of recovery against owner of the tractor. Hon'ble the Supreme Court refused to exercise its discretionary jurisdiction under Article 136 of the Constitution of India to set aside the findings of the Courts below directing the insurance company to pay and recover. The mere fact that Hon'ble the Supreme Court declined to exercise its discretionary jurisdiction, in the peculiar facts and circumstances of the case, would not entitle the respondents to assert that directions issued by the Tribunal to pay compensation to the claimants should be kept intact. In view of settled position in law that the insurance company is not liable to pay compensation for injury or death to a gratuitous passenger travelling on mudguard of the tractor, on the basis of policy obtained under Section 147 of the Act, findings of the Tribunal directing the insurance company to pay to the claimants and thereafter to recover from the owner cannot be allowed to sustain and accordingly set aside.

For the foregoing reasons, the appeal preferred by the insurance company is allowed and the insurance company is altogether exonerated of its liability to pay compensation. However, in case the insurance company has already paid compensation to the claimants, it shall not recover the amount from the claimants but would effect recovery from the insured/owner of the vehicle by filing an execution before the Tribunal. The appeal preferred by the respondents is dismissed. No order as to costs.

AUGUST 24, 2017 **(REKHA MITTAL)**
'D. Gulati' **JUDGE**

Whether speaking/reasoned : yes/no

Whether reportable : yes/no