

FAO No.578 of 2016 (O&M)
FAO No.7354 of 2015 (O&M)
FAO No.7355 of 2015 (O&M)

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. FAO No.578 of 2016 (O&M)

HDFC ERGO General Insurance Company
Limited

... Appellant

Versus

Smt. Asha and others

... Respondents

2. FAO No.7354 of 2015 (O&M)

HDFC ERGO General Insurance Company
Limited

... Appellant

Versus

Sanjiv and others

... Respondents

3. FAO No.7355 of 2015 (O&M)

HDFC ERGO General Insurance Company
Limited

... Appellant

Versus

Sandeep and others

... Respondents

Date of Decision: 19.01.2018

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Pradeep Kumar, Advocate,
 for the appellant.

Mr. Aditya Yadav, Advocate,
for respondents No.1 to 4 in FAO No.578 of 2016.

Mr. Ashish Pannu, Advocate,
for respondent No.1 in FAO No.7354 of 2015.

Mr. S.S. Hira, Advocate,
for respondent No.1 in FAO No.7355 of 2015.

RAJIV NARAIN RAINA, J.

1. This order will dispose of FAO No.578 of 2016 titled *HDFC ERGO General Insurance Company Limited v. Smt. Asha and others*, FAO No.7354 of 2015 titled *HDFC ERGO General Insurance Company Limited v. Sanjiv and others* & FAO No.7355 of 2015 titled *HDFC ERGO General Insurance Company Limited v. Sandeep and others*.

2. These are three appeals by the Insurance Company relating to the same accident. The main appeal FAO No.578 of 2016 arises from a death case while the two connected appeals are in cases of injuries sustained. The three appeals can easily be decided by common order.

3. Anand died in an accident on February 06, 2013 while he was in a jeep travelling from Kharkhoda to Sampla. The jeep unfortunately overturned as a result of the accident Anand was thrown out and crushed, mortally wounding him. He was brought dead to Civil Hospital, Kharkhoda.

4. The driver Rishi Parkash was charge-sheeted *inter alia* under Section 304-A of IPC. Anand was 45 years at the time of accident. He was working as Gardener in Municipal Corporation, Delhi earning ₹23,871/- per month. He left behind his widow and three children. The Tribunal held that two children were not dependent on him and proceeded to determine compensation for the widow and minor daughter-petitioner No.4 in the

original claim application. The Tribunal applied the principle in Smt. Sarla Verma and others v. Delhi Transport Corporation and another, (2009) 2 SCC (Civil) 770 and reduced the income by 1/3rd towards personal living expenses which Anand would have spent had he been alive. The multiplier 13 was applied. Applying the law in Rajesh and others v. Rajbir and others, (2013) 9 SCC 54 the Tribunal awarded ₹1 lakh for loss of consortium and ₹50,000/- for the minor daughter towards loss of love and affection and guidance. Besides, the amount of ₹20,000/- was awarded towards transportation and funeral expenses and amount of ₹4,38,970/- was awarded to be paid by the insurer with right to recover compensation from owner and driver. The interest was awarded @7.5% per annum.

5. In the present appeal filed by the Insurance Company, no opinion is expressed on the quantum of compensation which will more appropriately be decided in the appeals filed by the claimants which are pending in this Court. However, in view of Special Leave Petition (Civil) No.25590 of 2014, *National Insurance Company Limited v. Pranay Sethi and others* the compensation model in *Rajesh* case (Supra) is not to be followed since it has been declared not good law. Accordingly, consortium is reduced from ₹1 lakh to ₹40,000/- while transportation and funeral expenses are reduced to ₹15,000/- and in addition ₹15,000/- for loss of estate is awarded under which head the Tribunal has granted no compensation. Loss of love and affection and guidance of father is no longer a sustainable head of compensation and, therefore, ₹50,000/- granted towards compensation is set aside. The award dated September 30, 2015

passed by the MACT Jhajjar deserves to be modified accordingly but since future prospects have not been awarded in terms of *Pranay Sethi* the same can be urged by the claimants in their pending appeals and no opinion is expressed thereon as far as the present appeals filed by the Company is concerned.

6. The issue which has been furiously battled by Mr. Pradeep Kumar, learned counsel appearing for the appellant is whether the Insurance Company is liable to pay compensation to any of the claimants.

7. It is the contention of Mr. Pradeep Kumar that the Insurance Company is not liable to indemnify the insured because the deceased was a passenger in the vehicle and no premium has been paid by the owner of the vehicle to cover risk of the passenger. He urges that the perusal of the policy on record shows that no premium was paid by the owner of the vehicle towards passenger travelling in the offending vehicle. It is the further submission that the offending vehicle was being driven on hire and the deceased and the injured were one of nine passengers travelling in the ill fated jeep. The jeep was being used as a taxi and driven on hire. The insurance policy Ex.R-2 shows that the policy covers use of other than the hire or reward. Thus there is violation of the terms and conditions of the insurance policy which is a binding contract between the parties.

8. The case in United India Insurance Company Ltd. v. Sukhni Mahto and others, 2010 STPL (Comp) 83 JHAR was relied on. There is no dispute that the vehicle was registered in the name of Surender son of Umed Singh respondent No.2 on transfer in his name on January 06, 2010 vide

Ex.R-2. The driver of the offending vehicle had a valid and effective driving licence to drive LMV (non-transport) vehicle and it is urged that the offending vehicle is not for transport and, therefore, there was violation of the driving licence.

9. The specific contention of the appellant is that the insurance policy was an 'Act' policy and an 'Act' policy stands on a different footing from a Comprehensive/Package Policy and this distinction is vital and relief would depend on it. He refers to National Insurance Company Ltd. v. Balakrishnan and another, 2013 (1) RCR (Civil) 762 to quote paragraphs 21 and 23 of the judgment which are reproduced for ready reference:-

“21. In view of the aforesaid factual position, there is no scintilla of doubt that a “comprehensive/package policy” would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an “Act Policy” stands on a different footing from a “Comprehensive/Package Policy”. As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a “Comprehensive/Package Policy” covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the “Act Policy” which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a “Comprehensive/Package Policy”, the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars

which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.

22. In view of the aforesaid legal position, the question that emerges for consideration is whether in the case at hand, the policy is an “Act Policy” or “Comprehensive/Package Policy”. There has been no discussion either by the tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a “comprehensive policy” but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a “package policy” to cover the liability of an occupant in a car.

23. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the tribunal as regards the liability of the insurer and remit the matter to the tribunal to scrutinize the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a “Comprehensive/Package Policy”, the liability would be fastened on the insurer. As far as other findings recorded by the tribunal and affirmed by the High Court are concerned, they remain undisturbed.”

10. No discussion would be complete without reference to Bhagyalakshmi and others v. United Insurance Company Limited and another, (2009) 7 SCC 148 with the Supreme Court observing:-

“Before this Court, however, the nature of policies which came up for consideration were Act policies. This Court did not deal with a package policy. If the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third-party risk which would include all persons including occupants of the vehicle and the insurer having entered into a contract of insurance in relation thereto, we are of the opinion that the matter may require a deeper scrutiny.”

11. Learned counsel then cites the Delhi High Court judgment in Yashpal Luthra and another v. United India Insurance Co. Ltd. and another, 2011 ACJ 1415 which has been noticed by the Supreme Court in *Balakrishnan* case and is an elaborate discussion on the circular dated November 16, 2009 issued by IRDA to all insurance companies restating the legal position relating to the liability of the insurance company in respect of a pillion rider on a two-wheeler and occupants in a private car under the Comprehensive/Package Policy.

12. In case Manager, National Insurance Co. Ltd. v. Sheela and another, 2008 (18) RCR (Civil) 615 the Karnataka High Court while dealing with Section 147 (1) of the Motor Vehicles Act, 1988 ("1988 Act") held that a case of passengers in a private jeep sustaining injuries as a result of road accident are not entitled to compensation when the jeep was insured under 'Act' only policy. The 'Act' only policy does not require the insurer to cover the risk of an occupant of a private car or jeep. Counsel then relies on Manager, National Insurance Company Limited v. Saju P. Paul and another, (2013) 2 SCC 41. In National Insurance Co. Ltd. v. Challa Bharathamma and others, (2004) 8 SCC 517 the Supreme Court in paragraph 13 observed as under:-

"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.

13. A similar situation was dealt with by the Supreme Court in National Insurance Co. Ltd. v. Baljit Kaur and others, (2004) 2 SCC 1.

These rulings are largely on the principle of pay and recover as evolved by Courts.

14. The question whether Insurance Company can show and prove that it does not have any liability to pay any amount of compensation in law to the claimants under the 1988 Act or any other enactment, can the Court yet compel it to pay the amount of compensation giving liberty to the Insurance Company to recover the same from owner of the vehicle is one of the questions referred to a larger Bench of the Supreme Court in National

Insurance Company Ltd. v. Parvathneni and another, 2009 (4) RCR (Civil) 269.

15. On the other hand the learned counsel for the claimants relies on the judgment in *Manuara Khatun and others v. Rajesh Kr. Singh and others*, (Civil Appeal No.3047 of 2017) decided on February 21, 2017. In this case, the finding of the Tribunal was that the two deceased were travelling in a Tata Sumo for hire and hence they were gratuitous passengers and due to this reason the company-insurer of the offending vehicle-Tata Sumo was not liable. Accordingly, the Insurance Company was exonerated from liability and award was passed only against the owner of the Tata Sumo. The Supreme Court noticed its earlier decision in *Bhagyalakshmi, Saju P. Paul* and Oriental Insurance Co. Ltd. v. Nanjappan and others, (2004) 13 SCC 224 and culled out the question which fell for consideration which was whether the claimants are entitled for an order against the insurer to pay the awarded amount to them and then to recover the said amount from the insured in the same proceedings. The Supreme Court observed in paras.20 and 22 as follows:-

“20) We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in Saju P. Paul’s Case (supra). Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16 years) like the one in Saju P. Paul’s Case (supra), it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this Court has already considered and rejected the argument regarding not granting of the relief of the nature claimed herein due to pendency of the

reference to a larger Bench as would be clear from Para 26 of the judgment in Saju P. Paul's case (supra). That apart, learned counsel for the appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this reason also, the argument does not survive any more.

22) In view of the foregoing discussion, we are of the view that the direction to United India Insurance Company (respondent No. 3) - they being the insurer of the offending vehicle which was found involved in causing accident due to negligence of its driver needs to be issued directing them (United India Insurance Company-respondent No.3) to first pay the awarded sum to the appellants (claimants) and then to recover the paid awarded sum from the owner of the offending vehicle (Tata Sumo)-respondent No.1 in execution proceedings arising in this very case as per the law laid down in Para 26 of Saju P. Paul's case quoted supra."

16. Mr. Pradeep Kumar submits that the judgment in *Manuara Khatun* is contrary to the law declared in *Balakrishnan* (Supra). The case *Saju P. Paul* is distinguishable as it relates to goods vehicle where a co-driver died in the accident and is, therefore, distinguishable. The distinction drawn by the learned counsel appears to be unrealistic and rather technical to accept to deprive the claimants from compensation altogether.

17. The respondents heavily rely on a decision of the Madras High Court in *New India Assurance Co. Ltd. v. Murugan and others* (C.M.A. Nos.3661 of 2013 and 2080 of 2014) decided on January 05, 2017 curates the expression "injury to any person" inserted by amendment w.e.f. November 14, 1994 in Section 147 (2) (i) of the Act.

18. Section 147 defines the requirement of policies and limits of liability. Sub-Clause (ii) of Sub-Section (2) of Section 147 deals with the

death of or bodily injury to passengers of a public service vehicle caused by or arising out of the use of the vehicle in a public place. These provisions were considered by the Full Bench of the Kerala High Court in Oriental Insurance Co. Ltd. v. Ajayakumar, 1999 ACJ 1499 (judgment noticed in *Murugan*) held that the risk of a passenger travelling in a private vehicle gratuitously was covered by an 'Act' policy and the insurance company was liable. In Oriental Insurance Co. Ltd. v. Radha Rani, 1999 ACJ 1524 the question arose in a case of a death of a non-fare paying passenger in a jeep when the vehicle dashed against an electric pole, whether the insurance company was liable under 'Act' policy, the Division Bench of the Madhya Pradesh High Court held that 'any person' in Section 147 (1) of the 1988 Act would cover an occupant who was carried without hire or reward and even if no extra premium was paid for such passengers and the policy was only an Act policy, the insurer company would be liable.

19. The Madras High Court in *Murugan* case (Supra) quoted from the Full Bench of the Madhya Pradesh High Court in Jugal Kishore and another v. Ramlesh Devi and others, 2004 ACJ 297, while dealing with the meaning and scope of 'third party' under Section 145 (g) of the 1988 Act and held that 'third party' should include everyone, be it a person travelling in another vehicle, one walking on the road or passenger in the vehicle itself which is subject matter of the insurance policy. The relevant paragraphs were extracted which read as follows:-

“14. Word "third party" is considered by the Division Bench of this Court in the case of Usha Jain v. United India Insurance Co., (1996 JLJ 117) in para 7 of the

judgment, it is held that word "third party" have nowhere been defined in the Act and under Chapter VIII section 93(d) of the Act only states that "third party" includes the "Government". In the context of the provisions contained in Chapter VIII and the Scheme of Insurance with regard to motor vehicles, it may well be understood by the words "third party" that they include persons and Government other than the insurer and insured.

15. In the case of Nagashetty (supra) the question was considered that the driver of the vehicle was not having valid licence to drive a tractor. It was contended that under section 10 licence is granted to drive specific category of motor vehicles. Merely attachment of a trailer to the tractor for carrying goods, licence to drive tractor will not become ineffective. Tractor shall remain a tractor and its nature will not change. In this case, insurance policy was issued for tractor and additional premium of Rs. 12/- has been taken for a trailer. In this case, deceased were walking on the road when the tractor with trailer dashed against the deceased and the injured. Apex Court held that the deceased and injured are third party and were not passengers in the vehicle.

16. On the question whether the insurance company is liable to indemnify the gratuitous passengers travelling in a trailer of a tractor and whether such passengers will be treated as "third party". On one hand, claimants and owner of the vehicle have argued that the third party would mean passengers travelling in a tractor whereas on the other hand, this proposition was seriously contested by the insurance company. Insurance company submitted that if accident occurs and the victim who is not travelling in the same vehicle will be third party, but gratuitous passengers travelling in the trolley of the tractor will not be third party and insurance company is not liable to indemnify such passengers.

17. Section 145(g) of the Act defines "third party". It defines that the "third party" includes the Government. It would mean that other than the contracting parties to the insurance policy, the expression "third party" should include everyone, be it a person travelling in another vehicle, one walking on the road or a passenger in the vehicle itself which is the subject-matter of the insurance policy. Every insured takes out an insurance policy against a third party risk and enters into a contract with insurer only with the motive, intention and purpose of covering the risks which may arise in relation to claims lodged against him by a third party. Insurer agreeing to issue insurance policy thereby undertakes to insure the insured and indemnify him against all risks in relation to all claims lodged against him by third party. It will not be proper to narrow the scope and ambit of the word "third party" and exclude the passengers from the operation and purview which would not only defeat the very purpose of taking out the insurance policy, but the very object of the Motor Vehicles Act which makes it mandatory requirement of law that all vehicles/owners of the vehicles must be compulsorily insured against third party risk.

19. In the case of New India Insurance Co. v. Kamla (supra), the Apex Court has considered the implication arising out of Sub-section (4) and its proviso together with section 149 of the Motor Vehicles Act, 1988 and has held that the provisions are intended to safeguard the interest of the insurer who otherwise is not liable to pay any amount to the insured, but for the provisions contained in Chapter XI of the Act. This would mean that the insurance company has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy."

20. In view of the case law noticed above, the learned counsel for the respondents asserts that insurance company cannot escape its liability.

21. I have carefully considered the respective contentions and have perused the insurance policy with the help of the learned counsel and find from there, notably, that the contract was “Private Car Package Policy”. The policy covers use of the vehicle for any purpose other than for hire or reward, organized racing and speed testing. There are no other limitations as to use. There is a recital for certifying the policy to which the certificate relates as well as the certificate of insurance are issued in accordance with the provisions of Chapter X, Chapter XI of 1988 Act. There is an “Important Notice” in the last column of the first page of the policy (p.283 of the LCR Ex.R-4) stipulating that the insured is not indemnified if the vehicle is used or driven otherwise than in accordance with “this Schedule”. It is provided that “any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with the Motor Vehicles Act, 1988 is recoverable from the insured”. In the same column in second last sentence it is recorded: see the clause headed AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY which on p.3 of the insurance cover (p.287 of LCR) reads as follows:-

“AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY

Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act.

But the insured shall repay to the Company all sums paid

by the Company which the Company would not have been liable to pay but for the said provisions.”

22. The provision as to liability to third parties in Insurance Regulatory and Development Authority Circular dated November 16, 2009 which has been incorporated in the insurance cover reads as follows:-

“i) LIABILITY TO THIRD PARTIES

1. Subject to the Limit of liability as laid down in the schedule hereto, the Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle anywhere in India against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of

i. Death of or bodily injury to any person so far as it is necessary to meet the requirements of the Motor Vehicles Act.

ii. Damage to property other than property belonging to the insured or held in trust or in the custody or control of the insured up to the limit specified in the schedule.”

23. Mr. Pradeep Kumar has produced by way of sample a Comprehensive/Package Policy of one Deepak Verma whose vehicle is insured by a Private Car Package Policy where the total premium paid is ₹35,119/- as against ₹3206/- in the present case to emphasize that the difference between premiums paid is very large. However, the expression 'Total Package Premium' is found in both the policies.

24. The insurance policies should be worded in simple English or Hindi etc. to understand the difference between the two types of policies. The policy may be 'Act' only policy but it does not say so clearly and the mind is lost in fine print. Insurance policies must explain risk coverage to the insured in all kinds of situations when they purchase third party liability

insurance or comprehensive insurance. The terms and conditions of the insurance policy remain closeted till the litigation starts and trouble begins.

25. There is no evidence of payment of fare in this case by the claimants to the driver/owner of the jeep. Therefore, even if the deceased/claimants were gratuitous passengers they were not travelling in a jeep run for hire or reward. They were merely passengers and, therefore, I agree with the learned counsel for the claimants that the issue is covered by the judgments cited by them supra. However, by way of abundant caution the right to recover is granted to the appellant against the driver/owner. In case, such an action is filed then the Motor Accident Claims Tribunal it would decide the same by applying its independent mind and no final opinion is expressed by this Court.

26. Nevertheless, the appeals are dismissed.

(RAJIV NARAIN RAINA)
JUDGE

19.01.2018

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Whether speaking/reasoned *Yes*

Whether reportable *No*