

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 07.05.2019****Judgment delivered on 25.6.2019****MAC No. 291 of 2013**

1. Bajaj Allianz General Insurance Company Limited, Shiv Mohan Bhavan, Vidhan Sabha Marg, Pandri, Raipur, Tahsil & District Raipur (C.G.) (Insurance Company)

---- Appellant**Versus**

1. Sagni Bai, W/o Late Badshah Singh Aged About 53 Years
2. Rekha Bai D/o Late Badshah Singh Aged About 28 Years

Both R/o Mudpar, Post- Kamkapar, Tahsil Lohara, District Durg (C.G.) (Claimants)

3. Krishna Kumar Salame S/o Ramlal Salame Aged About 30 Years R/o Gidhali, Thana & Tahsil Mohla, District Rajnandgaon C.G., (Driver)
4. Ramlal Salame S/o Vadi Lal Salame Aged About 55 Years R/o Gidhali, Thana & Tahsil Mohla, District Rajnandgaon (CG) [owner]

---- Respondents

For Appellant	:	Shri SS Rajput, Advocate
For Respondent No.1 & 2 :		Shri Shreyankar Nandy, Advocate on behalf of Shri A. Majumdar, Advocate.

C A V Order**Per Parth Prateem Sahu, J****25/06/2019**

1. Appellant- Insurance Company has filed this appeal under Section 173 of the Motor Vehicles Act 1988 (for short 'the Act of 1988') challenging the impugned award dated 14.12.2012 passed by learned Motor Accident Claims Tribunal, Rajnandgaon (CG) (for short 'the Claims Tribunal') in Claim

Case No.45/2009 by which learned Claims Tribunal partly allowed claim application, awarded total compensation of Rs.3,39,000/- and fastened liability to pay compensation on appellant-insurance company.

2. Facts of case, in nutshell, are that deceased Lakesh Kumar was engaged as 'labour' in tractor-trolley bearing registration No.CG08-C-9011 & CG08-C-9012 respectively. On 13.4.2009 at 11 p.m. in night, said Lakesh Kumar was returning his home in the said tractor-trolley, however, due to rash & negligent driving by driver of tractor-trolley, he fell down, came under wheels of trolley, sustained grievous injuries and succumbed to those injuries on the spot itself. Matter was reported to police station concerned based on which Crime No.37/09 was registered against respondent No.3-driver for commission of offence punishable under Section 304A of the Indian Penal Code.
3. Claimants / respondent Nos.1 & 2 herein filed claim application before the Claims Tribunal seeking compensation of Rs.22,66,000/- on account of death of deceased in a road accident. They have pleaded that deceased, who was engaged as labour in tractor-trolley in question, died in a road accident occurred due to rash and negligent driving by driver of tractor-trolley and that untimely death of deceased has caused loss to the claimants.
4. Respondents No.1 & 2 filed their reply to claim application and denied pleadings made therein including the fact that on the

date of accident, the deceased was engaged as labour in the offending vehicle. They have further pleaded that at the relevant period the offending vehicle was insured with non-applicant No.3/appellant herein and therefore liability, if any, for payment of compensation would be on insurance company.

5. Non-applicant No.3/appellant-Insurance Company also filed its reply denying averments made in claim application and stating that on the date of accident, driver of offending vehicle was not holding valid and effective driving license; the tractor-trolley is registered for agricultural purpose, but at the time of accident it was being used for commercial purpose and the deceased was travelling in trolley as a passenger.
6. Learned Claims Tribunal after appreciating pleadings and evidence of the parties arrived at a finding that accident took place due to rash and negligent act of driver of offending vehicle resulting into death of deceased Lakesh; on the date of accident, driver was holding valid & effective driving license to drive offending vehicle, which, on the date of accident, was being used for transporting cow-dung manure and deceased was travelling in trolley as a labour. The Claims Tribunal further recorded a finding that Ex.P-7, which is a cover note issued on 14.7.2008 in favour of owner of offending vehicle i.e. respondent No.4, clearly demonstrates that total amount of premium paid by insured is Rs.10,832/-, which includes payment of additional sum of Rs.100/- to cover risk of passenger and thus risk of passenger in trolley was covered in

the policy. On the above basis, the Claims Tribunal partly allowed claim application, awarded Rs.3,39,000/- as compensation and fastened liability to pay compensation on appellant insurance company.

7. Learned counsel for appellant Insurance Company would argue that tractor-trolley was insured for agricultural purpose only and farmer package policy was issued to respondent No.4, whereas, on the date of accident, deceased was travelling as passenger along with gift articles of marriage. Referring to contents of FIR (Ex.P-2), it was submitted that deceased had gone to village Mudpaar as a *barati*. He further refers to final report (Ex.P-1) wherein also it has been mentioned that tractor-trolley in question was returning from village Mudpaar with *baratis* and gift articles of marriage. On the basis of afore two documents, it has been submitted by learned counsel for appellant that the policy issued to owner of offending vehicle was a farmer package policy but on the date of accident tractor-trolley was used for carrying baratis & gift articles of marriage and thereby offending vehicle was being used for commercial purpose, which amounts to breach of conditions of insurance policy and therefore the finding of Claims Tribunal holding insurance company liable to pay compensation is erroneous. He further argued that under insurance policy (Ex.D-4), no risk of labour or passenger is covered.

8. Supporting the impugned award passed by Claims Tribunal, it

has been submitted by learned counsel appearing on behalf of respondent Nos.1 & 2 that insurance company has taken additional premium for covering risk of passenger and cover note to this effect was also issued, which is exhibited as Ex.P-7, therefore, the insurance company cannot escape from their liability under insurance policy.

9. I have heard learned counsel for the parties and perused the records.
10. Perusal of Final Report (Ex.P-1) & FIR (Ex.P-2) reveals that due to rash and negligent driving by driver of tractor-trolley in question, which was carrying baratis and gift articles of marriage, deceased Lakesh fell down, came under wheels of trolley and succumbed to injuries sustained by him. Claimants in claim application have pleaded that at the relevant time deceased was travelling as labour in offending vehicle in which cow-dung manure was being transported. This fact has also come in the evidence of Sagni Bai (AW-1) & Rekha Bai (AW-2). Panduram (AW-3) has stated in his evidence that on coming to know about accident, he went to the spot and saw deceased lying dead. According to this witness, the tractor-trolley were standing there and trolley attached to tractor was empty. This witness denied contents of Merg Intimation (Ex.P-4) lodged at his instance just after few hours of accident.
11. In such a situation, the question arises for consideration of this Court is as to for what purpose tractor-trolley was being used

at the time of accident?

12. Claimants in support of their case have filed and exhibited certain documents before the Claims Tribunal, which were marked as Ex.P-1 to Ex.P-6. Panduram (AW-3) is the person at whose instance merg intimation (Ex.P-4) was recorded. He is also resident of village Suarpal. Though this witness had denied that gift articles of marriage were being transported in trolley at the time of accident, but admitted in Para-2 of his cross-examination that when he had gone to police station for lodging report, at that time Bideram & Tulsiram were also with him. Based on Merg Intimation (Ex.P-4), FIR (Ex.P-2) was registered by police in which also it has been mentioned that at the time of accident, trolley attached to tractor was carrying baratis & gift articles of marriage. In the course of investigation, statements of nine witnesses under Section 161 of CrPC were also recorded which included Panduram, Bideram & Tulsiram and thereafter final report was filed mentioning that tractor-trolley was being used for carrying baratis with gift articles of marriage.
13. Hon'ble Supreme Court in the matter of **Oriental Insurance Company Ltd. vs. Premlata Shukla & others** reported in **(2007) 3 SCW 3591** has held as under:-

“13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to

turn around and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.”

14. In the case at hand, it is clear that person who lodged complaint is resident of same village, he was also examined as witness and FIR was also lodged within a few hours of accident. His statement under Section 161 CrPC was also recorded by police. It is settled position in law that when a party relies upon contents of a document to prove a particular fact then he cannot be permitted to deny facts mentioned in that document at subsequent stage. In such a situation, finding recorded by the Claims Tribunal that at the time of accident, tractor-trolley was being used for carrying cow-dung manure is not sustainable and is hereby set aside.
15. As held above that on the date of accident the tractor-trolley was being used for carrying baratis and gift articles of marriage, therefore, now it is to be seen whether offending vehicle can be used for such purpose and whether risk of a person sitting on trolley along with gift articles of marriage is covered under the policy or not?
16. Under the Motor Vehicles Act, 1988 erstwhile State of Madhya Pradesh framed the rules known as 'MP Motor Vehicles Rules, 1994'. After reorganisation of the State of MP, the Motor Vehicles Rules, 1994 have been adopted by newly created State of Chhattisgarh under Section 79 of the MP

Reorganization Act, 2000 and now it is known as 'CG Motor Vehicles Rules, 1994' (for short 'the Rules of 1994'). These rules have been framed in exercise of powers conferred by Sections 28, 38, 65, 95, 96, 107, 111, 138, 159, 176, 211 & 213 of the Act of 1988. Rule 97 of the Rules of 1994 deals with carriage of person in goods carriage. Relevant portion of Rule 97 is quoted below:-

“97. Carriage of person in Goods Carriage.- (1) No person shall be carried in a goods carriage other than a bonafide employee or the owner or the hirer and except in accordance with law.

(2) xxxxxxxx

(3) xxxxxxxx

(4) xxxxxxxx

(5) No person shall be carried in any goods carriage-

(i) unless an area of not less than 3600 square centimetres of the floor of the vehicle is kept open for such person

(ii) in such manner-

(a) that such person when carried on goods or otherwise is in danger of falling from the vehicle.

(b) that any part of his body, if he was in a sitting position, is not a height exceeding three metres from the surface upon which the vehicle rests.

(7). Notwithstanding anything contained in sub-rules (1) and (2) but subject to the provisions of sub-rule (5) such tractor- trailer other than those registered in the name of industrial organization, Municipal Institutions, water supply institution and non-agricultural co-operative societies and the unladen weight of which does not exceed 7300 kg may be used for the following purpose:-

(i) xxx xxx xxx

(ii) for carrying persons at the time of Mela, Markets, Religious Functions, Marriages and at other ceremonial occasions provided the number of persons so carried shall not exceed 20 at a time."

17. Perusal of Rule 97 would demonstrate that this rule permits carriage of passenger in goods carriage subject to availability of open space of floor for each person. It further specifically

envisages that tractor insured for agricultural purpose can also be used for carrying persons to Mela, Markets, Religious functions, Marriages and at other ceremonial occasions not exceeding 20 at a time.

18. As discussed above and in view of documentary evidence available on record, on the date of accident offending vehicle was carrying *baratis* and gift articles of marriage, on which deceased was also travelling. Rule 97 of the Rules of 1994 permits carriage of *baratis* in a goods carriage but a rider has been added that it shall not exceed 20 at a time. It is not the case of appellant insurance company that at the time of accident the persons travelling in trolley were more than 20 in numbers. There is no material and evidence available in record showing that at the time of accident more than 20 persons were travelling in trolley. Even there is nothing to show that sufficient space was not available in trolley for travelling of deceased, who met with accident and died while travelling on trolley. Thus, there is no doubt that carriage of persons in trolley attached with tractor in question along with gift articles of marriage was permissible on the date of accident.
19. Now the question arises for consideration is whether risk of deceased, who was travelling in trolley attached to tractor along with gift articles of marriage, is covered under the policy issued by insurance company?
20. Claimants have produced copy of cover note issued on

14.7.2008 to policy holder / owner of offending vehicle at the time of accepting premium amount of Rs.10,832/-, which is part of record. Cover note (Ex.P-7) bears No.BZ0800496780. Perusal of policy (Ex.D-4) issued on 6.8.2008 shows that it also bears same cover note number. Thus, the number mentioned in both these documents i.e. Ex.P-7 & Ex.D-4, is one and the same i.e. BZ0800496780. Insurance Policy (Ex.D-4) mentions about payment of total premium of Rs.10,832/- but detailed break-up of this amount has not been given. However, in the cover note premium calculation has been given at Clause No.11, according to which, total premium of Rs.10,832/- was received which includes Rs.100/- towards owner-driver cover, Rs.25/- for paid driver, Rs.100/- for passengers. Appellant Insurance Company examined its Law Officer namely Punit Rathore as NAW3-1. This witness admits that number mentioned in cover note also finds place in insurance policy. He further admits that if company had issued cover note then it will be of the same number, as mentioned in policy (Ex.D-4).

21. From the above evidence and documents available on record it is clear that number mentioned in cover note (Ex.P-7) & insurance policy (Ex.D-4) is one and the same. When once break-up of total premium amount is mentioned in cover note based on which insurance policy was issued then in case where break-up of premium amount or schedule has not been mentioned in insurance policy then break-up given in cover

note issued by authorized representative of insurance company for the purpose of coverage of premium can certainly be taken into consideration.

22. During the course of argument, an objection has been raised by learned counsel for the appellant that cover note (Ex.P-7) is a photocopy and original cover note has not been produced. Process of issuance of cover note is that only one copy is issued to owner of vehicle/purchaser of policy and other copy of cover note is made part of official record on the basis of which on subsequent date insurance policy is to be issued. This Court vide order dated 9.5.2014 directed appellant to file cover note (Ex.P-7). On 20.9.2018 also this Court directed learned counsel for appellant insurance company to comply with the direction issued vide order dated 9.5.2014, but appellant failed to produce cover note available with its office and even no affidavit in this regard has been filed.
23. In the facts and circumstances of case, when number of cover note which is mentioned in Ex.P-7 and as per admission of NAW-3 that if cover note is issued by a competent person then the number of cover note would be same as mentioned in insurance policy, this Court is of the opinion that photocopy of cover note (Ex.P-7), which is available in record at Page No.55 of the record of Claims Tribunal, is the same cover note which was issued at the time of receipt of amount of premium and before issuance of policy.
24. In the light of material and evidence available on record, it is

evident that insurance company has taken Rs.100/- for covering risk of passengers. When once insurance company accepts or charged premium for passenger then it also covers risk of passenger. In the instant case, claim is with respect to one passenger only.

25. Learned counsel for appellant relied on a Full Bench decision of Hon'ble High Court of MP in the matter of Bhav Singh v. Savirani & ors reported in 2008 (1) MPLJ 72 wherein the Full Bench has opined that Rule 97 is not to cover risk under Section 147 of the Act of 1988 automatically and held thus;-

“12.Regarding the Division Bench judgment in Sarvanlal and Ors. (supra), we find that the Division Bench has relied on not only the judgment of the Full Bench in Jugal Kishore (supra) but also Clause (vii) of Rule 97 of the Motor Vehicles Rules, 1994 (for short 'the Rules of 1994') made by the State of M.P. So far as the judgment of the Full Bench in Jugal Kishore (supra) is concerned, we have already clarified the position of law. Regarding Clause (7) of Rule 97 of the Rules of 1994, we find that the Rules of 1994 have been made by the State of M.P. under Section 96 of the Act and in particular Sub-section (2) (xxxi) which provides that without prejudice to the generality of the foregoing power, rules under Section 96 may be made with respect to the carriage of persons other than the driver in goods carriages. Section 96 is placed in Chapter-V of the Act which relates to 'Control of Transport Vehicles'. Sub-section (1) of Section 96 of the Act states that the State Government may make rules for the purpose of carrying into effect the provisions of Chapter-V. Hence, Rule 97 of the Rules of 1994 has been made by the State Government to give effect to the provisions of Chapter-V of the Act, which, as we have seen, relates to 'control of transport vehicles'. These rules obviously cannot have a bearing in interpreting the provisions of Chapter-XI of the Act including Sections 145 and 147 of the Act. As we have indicated above, the liability of the insurer to indemnify the insured in respect of death or bodily injury suffered by a passenger or an employee would be covered by the provisions of Section 147 of the

Act or the terms and conditions of the insurance policy. Thus, the decision of the Division Bench in Sarwan Lal (supra) in so far as it relies on Rule 97 of the Rules of 1994 to hold the insurer liable for death or bodily injury suffered by the passenger does not lay down the correct law.”

26. In the case of Bhav Singh (supra), Hon'ble Court found that no premium was paid for passenger and further held that liability of insurer to indemnify the insured will be governed by terms and conditions of insurance policy. In present case, premium was charged by appellant for covering risk of passengers.
27. In other two judgements relied by learned counsel for appellant in matter of Karamchand & others v. Budhani Bai & ors reported in (2011) 4 MPJR 14 & Radhika v. Minketan Nayak reported in (2011) AAC 325, wherein Rule 97 of Rules of 1994 was considered. In both the cases, as mentioned above, there was no contractual liability between insurer & insured to indemnify insured as in both cases no premium was paid for passengers, whereas in case at hand insurer charged and accepted premium for passengers. Aforementioned cases are on different facts.
28. Learned counsel for appellant relied upon judgment passed by Hon'ble Supreme Court in the matter of United Insurance Company Ltd. v. Sarejrao & ors reported in AIR 2008 SC 460 wherein Hon'ble Supreme Court while considering its earlier decision in Oriental Insurance Company Ltd. vs. Brijmohan reported in AIR 2007 SC 1971 has held that so far as liability regarding labourers travelling in trolley is concerned, the insurance company has no liability.

29. Above judgements relied upon by learned counsel for appellant are misplaced. In aforementioned cases, accident occurred prior to 1994 and there was no mention of any rule made by the State, whereas in case at hand, the State has framed rules permitting use of tractor-trolley for marriage purpose.
30. In the case at hand, the insurance company has accepted premium of Rs.100/- for covering risk of passengers and Rule 97 of Rules of 1994 itself provides that tractor-trolley can be used for carrying passengers at the time of marriage functions. Insurance policy is a contract between the parties and insurance company entered into contract to cover risk of passengers travelling in tractor-trolley by accepting premium then for the purpose of this particular case, the insurance company is liable for covering risk of passengers who were travelling in tractor-trolley along with gift articles of marriage.
31. In view of aforementioned facts and circumstances of case and in the light of provisions of Rule 97 of the Rules of 1994, I am of the view that there was no violation of any of the conditions of insurance policy and being so, the insurance company is obliged under its contractual liability to indemnify insured-owner of offending vehicle.
32. Although I am not in agreement with finding of Claims Tribunal with respect to status of deceased travelling on trolley attached with tractor, but, in view of discussions made above, I do not find any force in the argument of learned counsel for

appellant that as deceased was travelling in offending vehicle as a passenger along with gift articles of marriage, therefore, his risk was not covered under the policy.

33. Now the question arises for consideration is whether insurance company can be held liable for total amount of compensation or will have limited liability?
34. Deceased was occupant in offending vehicle and insurance company charged Rs.100/- for occupant. Therefore, insurance company will be liable for limited liability according to contract entered into vide Ex.P-7. In the matter of **National Insurance Company v. Challa Bharathamma & ors** reported in (2004) 8 SCC 517, the Hon'ble Supreme Court considered the proposition of pay and recover and held thus;-

“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.”

35. The Hon'ble Supreme Court again considered the issue of pay and recover in the matter of **Manura Khatun & ors v. Rajesh Kumar Singh & ors** reported in **(2017) 4 SCC 796** and held thus:-

“14.The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. vs. Baljit Kaur & ors, (2004) 2 SCC 1, National Insurance Co. Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, Natinal Insurance Co. Ltd. vs. Kaushalaya Devi & ors, (2008) 8 SCC 246, National Insurance Col Ltd. vs. Roshan Lal, (Order dated 19.1.2007 in SLP © No. 5699 of 2006], and National Insurance Co. Ltd. vs. Parvathneni & anr, (2009) 8 SCC 785.

15. This question also fell for consideration recently in [Manager, National Insurance Company Limited vs. Saju P. Paul & Anr.](#), (supra) wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of [Section 147](#) of the Act. While allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of “pay and recover”.

21.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."

36. Thus, keeping in mind above principles of law laid down by Hon'ble Supreme Court and facts of present case, it would be appropriate to issue a direction that appellant-insurance company will first deposit the entire amount of compensation and thereafter recover only excess amount of compensation than its contractual liability keeping in mind premium of Rs.100/-.

37. For the foregoing discussions, the appeal is allowed in part in following terms;

- appellant will first pay the amount of compensation to the claimants and thereafter recover excess amount of payment than its contractual liability, from owner of offending vehicle.
- appellant will be at liberty to recover the amount of compensation i.e. excess amount of compensation than its liability under policy, from owner of offending vehicle in the manner as provided in the matter of **Oriental Insurance Company Limited v. Nanjappan** reported in **AIR 2004 SC 1631**.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-