IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision: 11.07.2022

1. FAO-567-2017 (O&M)

Aayan and another

... Appellants

Vs.

Pawan Kumar and another

... Respondents

2. FAO-568-2017 (O&M)

Aayan and another

... Appellants

Vs.

Pawan Kumar and another

... Respondents

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present: Mr. Ashit Malik, Advocate
for the appellants.

Mr. Navmohit Singh, Advocate
for respondent No.1.

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ARVIND SINGH SANGWAN, J. (ORAL)

CM-1801-CII-2017 in FAO-567-2017

For the reasons stated in the application, same is allowed and delay

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of 138 days in filing the appeal is condoned.

CM stands disposed of.

CM-1803-CII-2017 in FAO-568-2017

For the reasons stated in the application, same is allowed and delay of 138 days in filing the appeal is condoned.

CM stands disposed of.

FAO-567 & 568-2017

Challenge in both these appeals is to the award dated 25.04.2016 passed by the Motor Accident Claims Tribunal, Kaithal.

The contested issue No.5 in these appeals, as framed by the Tribunal, reads as under: -

> "*Whether the above vehicle was being driven without registration certificate and route permit and in contravention of the Motor Vehicles Act and terms and conditions of the insurance policy, if so, its effect? OPR-2*"

Brief facts of the case are that in a motor vehicle accident, appellant No.1 Aayan, aged about 13 months at the time of accident, lost his parents. Appellant No.2 Savitri is mother of deceased Sunil Kumar i.e. father of appellant No.1 Aayan. The Tribunal on issue No.1 regarding negligence held that the accident dated 11.01.2015 resulting into death of Sunil Kumar and Parveen @ Priya occurred on account of rash and negligent driving of vehicle bearing registration No.HR-08Q-5324, however, with regard to liability to pay compensation, under issue No.5, a finding is recorded against the appellants by making the following observations: -

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"On behalf of the insurance company, Sh.C.L.Uppal, Advocate referred to Ex.RD copy of Megma General Insurance Policy relating to the offending tractor-trailer. It was argued that the policy was a commercial vehicle package policy and covered used of the vehicle under only a permit. There was no permit of the tractor-trailer, placed on the record nor the trailer was insured. Therefore, the insurance company ought to be exonerated. He also referred to the statement on oath of PW1 Ramphal who admitted in cross examination that the trailer was loaded with tent articles and submitted that the tractor-trailer being used for commercial purposes, could not be driven without a valid permit. In support of his arguments, learned counsel referred to The New India Assurance Company Limited Vs. Sohan Lal and others 2013(1) PLR 706 (P&H); Pula Ram and others Vs. State of Haryana and others 2014(3) PLR 427 (P&H) and Mam Chand etc. Vs. Sunita Devi and others FAO No. 3966 of 2010, decided on 28 Nov. 2011 by High Court of Punjab and Haryana . Learned counsel for the insurance company argued that no addition ought to be made in income of deceased on account of future prospects. In support he referred to Mohinder Kaur and another Vs. Pawlinder Singh alias Balwinder Singh and others 2016(1) PLR 259.

26. On behalf of respondent No.2, Sh. Prem Kumar Chhabra, Advocate contended that the vehicle was not being used as a commercial vehicle. Therefore, the insurance company was

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liable when driver-respondent No.1 had a valid and effective driving licence (Ex.RA) to drive the tractortrailer and the vehicle was duly insured vide policy Ex.RD.

27. Basically, only three facts need to be established by the claimants for assessing compensation in the case of death; (a) age of the deceased; (b) income of the deceased; and (c) the number of dependents.

28. The issues to be determined by the Tribunal to arrive at the loss of dependency are (i) additions/deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased.

xxx xxx xxx

48. Statement of PW1 Ram Phal, an eye witness to the accident, in cross examination reveals that the trolley was loaded with tent articles. Therefore, it cannot be canvassed that the tractor trolley was not being used for commercial purposes and did not require permit. Even otherwise, in Sohan Lal's case (Supra) it has been held that if a tractor draws a trailer and the accident is caused by such tractor-trailer, then the vehicle causing the accident would not be a tractor but a goods vehicle. It is only if both tractor and trailer are insured, the insurer would be liable to indemnify the owner against claims arising out of use of tractor and trailer. This view would be in conformity with the other

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statutory provisions which require even a trailer to be insured. Similarly in Pula Ram'case (Supra) Hon'ble Punjab and Haryana High Court held that no tractor is allowed to transport goods without permit. The same proposition has been reiterated in Mam Chand's case (supra). There is nothing on record to show that tractor was being used for agricultural purposes. Since the trolley was loaded with tent articles, therefore, the use of the tractor-railer was certainly for a commercial purpose. It required a valid goods permit to be plied on the road.

49. In such a situation, Hon'ble High Court has held that even principle of 'pay and recover' cannot be invoked and liability would arise only when there is insurance at first place but the insurer has a right of defence of violation of terms of policy to claim right of recovery against the insured. Thus there is no scope of making the insurance company liable and the claim can be only passed against tractor-trailer and driver. Reference may be made to Mam Chand's case (Supra).”

The Tribunal accordingly held that principle of pay and recover cannot be invoked against respondent No.2 i.e. Magma General Insurance Co. Ltd., as liability would arise only when there is an insurance at first place and the insurance company has a right of defence regarding violation of terms of the policy and to claim right of recovery against the insured.

Learned counsel for the appellants submits that the findings recorded by the Tribunal that since owner of the offending tractor was not

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having a valid insurance, therefore, the Insurance Company cannot be held liable, is erroneous. Learned counsel has relied upon a judgment of the Hon'ble Supreme Court in **Amrit Paul Singh and another Vs. TATA AIG General Insurance Co. Ltd. and others, Civil Appeal No.2253 of 2018 (arising out of SLP (Civil) No.7692 of 2017), decided on 17.05.2018,** wherein, while dealing with similar issue, following findings have been recorded: -

> *"In the case at hand, it is clearly demonstrable from the materials brought on record that the vehicle at the time of the accident did not have a permit. The appellants had taken the stand that the vehicle was not involved in the accident. That apart, they had stated whether the vehicle had temporary permit or any other kind of permit. The exceptions that have been carved out under Section 66 of the Act, needless to emphasise, are to be pleaded and proved. The exceptions cannot be taken aid of in the course of an argument to seek absolution from liability. Use of a vehicle in a public place without a permit is a fundamental statutory infraction. We are disposed to think so in view of the series of exceptions carved out in Section 66. The said situations cannot be equated with absence of licence or a fake licence or a licence for different kind of vehicle, or , for that matter, violation of a condition of carrying more number of passengers. Therefore, the principles laid down in Swaran Singh (supra) and Lakhmi Chand (supra) in that regard would not be applicable to the case at hand. That apart, the insurer had taken the plea that the vehicle in question had no permit. It does not require the wisdom of the "Tripitaka", that the existence of a permit of any nature is a matter of documentary evidence. Nothing has been brought on record by the insured to prove that he had a permit of the vehicle. In such a situation, the onus cannot be cast on the insurer. Therefore, the tribunal as well as the High Court had directed the*

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> *insurer was required to pay the compensation amount to the claimants with interest with the stipulation that the insurer shall be entitled to recover the same from the owner and the driver. The said directions are in consonance with the principles stated in Swaran Singh (supra) and other cases pertaining to pay and recover principle."*

As noticed above, despite service to respondent No.2 through legal retainer, no one has put in appearance on behalf of the Insurance Company.

In view of the above, both these appeals are partly allowed. The finding recorded by the Tribunal on issue No.5 is reversed and it is held that the appellants are entitled to recover the amount as awarded by the Tribunal from respondent No.2-Megma General Insurance Co. Ltd. with a recovery right to respondent No.2 to recover the same from respondent No.1 Pawan Kumar, driver and owner of the offending vehicle, in accordance with law.

Disposed of, accordingly.

A photocopy of this order be placed on the file of connected case.

[ARVIND SINGH SANGWAN]
JUDGE

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Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No

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