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**(2011) 09 J&K CK 0001**  
**In the Jammu And Kashmir High Court**  
**Case No : C.I.M.A. No's. 10 and 11 of 2001**

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| National Insurance Co. Ltd. | Vs | APPELLANT  |
| Kulwant Singh and Others    |    | RESPONDENT |

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**Date of Decision :** 09-09-2011

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 140, 149(2), 163A, 163A(1), 163A(2)  
Workmens Compensation Act, 1923 — Section 3, 4

**Citation :** (2013) ACJ 1761

**Hon'ble Judges :** Hasnain Massodi, J

**Bench :** Single Bench

**Advocate :** Baldev Singh, for the Appellant; P.N. Goja, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Hasnain Massodi, J.—Gurdeep Singh, son of Kulwant Singh, resident of Dyala Chak, Batala, District Gurdaspur, employed in Indo-Tibetan

Border Police (ITBP), died on 29.9.1997 in a vehicular accident when truck No. JKR 535 rashly and negligently driven by its driver Avtar Singh

fell in deep gorge at Merog, Ramban. The occurrence led to registration of case, F.I.R. No. 56 of 1997 under sections 279/ 304-A, Ranbir Penal

Code. The driver of the truck also died in the accident. Kulwant Singh, father of deceased, his mother, widow and two minor children filed Claim

Petition No. 26/claim on 25.10.1997 under sections 166/ 140, Motor Vehicles Act before the Motor Accidents Claims Tribunal (M.A.C.T.),

Ramban.

2. The petitioners asked for compensation of Rs. 10,00,000 from National Insurance Co. Ltd., with which the offending truck was insured as also

Dayal Singh, s/o Ajit Singh, r/o Musa Chak, Tehsil R.S. Pura, owner of the

offending vehicle.

3. Jhanda Singh, father of Avtar Singh, driver of the offending vehicle, his widow and his two minor children also filed the Claim Petition No.

24/claim on 26.9.1997 against National Insurance Co. Ltd. and the owner of the vehicle. The petitioners claimed an amount of Rs. 20,00,000 as compensation from the respondents.

4. The claim petition filed by Kulwant Singh and others (Claim Petition No. 26/claim) was opposed by insurance company on the ground that as

the deceased was an unauthorised passenger in the offending vehicle, the insurance company was not liable to pay any compensation to the

petitioners. It is insisted that liability of insurance company under the insurance policy is limited/restricted to the ambit and scope of insurance

policy. It was pleaded that the insurance company may not be liable to pay any compensation in the event it was proved that the driver of offending

vehicle was not holding a valid and effective driving licence or that offending vehicle at the time of accident was being plied in contravention of

route permit, fitness certificate or the policy of insurance. The insurance company resisted the claim petition filed by Jhanda Singh and others

(Claim Petition No. 24/claim) on the ground that as the deceased was driver of the vehicle and was responsible for the accident, it was not bound

to pay compensation to the dependants of deceased driver. It was pleaded that the deceased being himself tortfeasor, his dependants were not

entitled to recover any compensation from the insurance company. It was further contended that as deceased was a paid employee of Dayal Singh,

respondent No. 2 in the petition, the deceased was a workman within the meaning of the Workmen's Compensation Act and right course for

petitioners was to approach the authority under Workmen's Compensation Act for award of compensation against the employer of the deceased.

It was reiterated that liability of insurance company was restricted to the ambit and scope of insurance policy and not beyond the terms of

insurance contract. It was pleaded that the insurance company may be able to escape the liability to pay compensation to the petitioners in case the

driver is found to have not been holding valid and effective driving licence at the time of accident or the offending vehicle was found to have been

plied at the time of accident in contravention of route permit, fitness certificate

and policy of insurance. The Tribunal, on perusal of pleadings in the aforementioned two claim petitions arising out of the same accident, settled the following issues:

Claim Petition No. 26/claim

(i) Whether the death of Gurdeep Singh, s/o Kulwant Singh, ITBP constable, was caused on 10.9.1997 on National Highway at Kilometre No.

156, because of use of motor vehicle No. JKR 535 which was plied by Avtar Singh, driver who was under employment of Dayal Singh, respondent

No. 6 and vehicle was insured with National Insurance Co. Ltd. and the driver has also died in the accident?

OPP

(ii) On proof of issue No. 1, to what amount of compensation the petitioners are entitled and from whom and in what proportion?

OPP

(iii) Whether insurance company is not liable to pay compensation as the deceased was unauthorised passenger in the offending vehicle?

OPP-1

(iv) Relief.

Claim Petition No. 24/claim

(i) Whether the death of Avtar Singh, s/o Jhanda Singh, r/o Digyana Tehsil, R.S. Pura, Jammu was caused on 10.9.97 on NH at Kilometre No.

166 because of use of motor vehicle No. JKR 535 of which deceased was the driver and was under the employment of Dayal Singh, respondent

No. 2, the vehicle was insured with National Insurance Co. Ltd.?

OPP

(ii) On proof of issue No. 1, to what amount of compensation the petitioners are entitled and from whom and in what proportion?

OPP

(iii) Whether the insurance company is liable to pay as the deceased driver was himself tortfeasor?

OPP

(iv) Whether the petition is not maintainable as the petitioners ought to have approached the forum under the Workmen's Compensation Act?

## OPP-1

5. The claimants in both the claim petitions stepped in the witness-box. However, the insurance company did not adduce any evidence either to

prove the issues, the burden whereof was put on the insurance company or to rebut the evidence adduced by petitioners. The evidence was

accordingly closed on 6.7.1999. The Tribunal, on perusal of the pleadings and the evidence brought on the file, passed two separate awards on

31.10.2000.

6. In Claim Petition No. 26/claim, the Tribunal rejected the contention of the insurance company that it was not liable to pay any compensation, as

the deceased Gurdeep Singh, constable, ITBP, was an unauthorised/gratuitous passenger. The reliance was placed by the Tribunal on the law laid

down in New India Assurance Company Vs. Shri Satpal Singh and Others, . The Tribunal thereafter proceeded to assess the compensation having

regard to settled legal principles. The Tribunal awarded an amount of Rs. 4,00,000 with 12 per cent interest from the date of filing of claim petition

till its final realization to be apportioned in equal shares among five claimants in the petition.

7. In Claim Petition No. 24/claim, the Tribunal rejected the case set up by the insurance company that as the deceased himself was tortfeasor, his

dependants were not entitled to maintain the claim. It was held that the insurance company had failed to prove that the deceased was the tortfeasor

and that the accident was not attributable to the act of God or mechanical defect in the offending vehicle. As regards the necessity to fall back on

Workmen's Compensation Act instead of the Motor Vehicles Act, the Tribunal held that the petitioners were well within their rights to exercise the

option and choose either of the remedy available under law to get compensation under Workmen's Compensation Act or the Motor Vehicles Act.

The Claims Tribunal proceeded to assess the compensation payable to the petitioners at Rs. 3,12,500 with 12 per cent interest from the date of

filing of the claim till its final realization.

8. The insurance company has filed two appeals registered as C.I.M.A. Nos. 10 of 2001 and 11 of 2001 to assail the awards made in Claim

Petition No. 26 and Claim Petition No. 24 respectively. The grounds urged in the memoranda of appeals are identical to the case set up by the

appellant in opposition to the claim petitions. It is reiterated that the appellant was not liable to pay any compensation to Kulwant Singh and others

on account of accidental death of Gurdeep Singh for the reasons that the deceased was an unauthorised/gratuitous passenger in the offending

vehicle and not covered by the premium paid by the owner of the vehicle. The appellant insists that as deceased Avtar Singh was himself

responsible for the accident and tortfeasor because of the negligence committed, his dependants were stripped off any right to maintain the claim

petition against the appellant. The next ground urged relates to liability of the owner of the vehicle to pay compensation to the petitioners under the

Workmen's Compensation Act. The common ground urged in both the appeals is that Tribunal committed gross irregularity in disallowing the

appellant's application for summoning the Licensing Authority or any official from its office to prove that the driver of offending vehicle was not

holding a valid and effective driving licence at the time of accident and thus, there is a breach of terms and conditions of the insurance policy on

part of the owner of offending vehicle.

9. I have gone through the memoranda of appeals as also the record received from the Tribunal. I have heard learned counsel for the parties.

C.I.M.A. No. 10 of 2001

10. The appellant assails the award primarily on the ground that the deceased was unauthorised/gratuitous passenger in the offending vehicle at the

time of accident. This plea appears to have been raised before the Tribunal. However, the Tribunal relying on the law laid down in New India

Assurance Company Vs. Shri Satpal Singh and Others, , repelled the attack and held the plea to have become 'non-issue' in the wake of aforesaid

judgment. The Supreme Court in New India Assurance Co. Ltd. Vs. Asha Rani and Others, , reversed judgment in New India Assurance

Company Vs. Shri Satpal Singh and Others, , relied upon by the Tribunal. The court held that an insurer would not be liable to indemnify the

owner of the vehicle on account of death of a person travelling unauthorisedly in a vehicle because of the accident involving such vehicle. The law

on the subject was reiterated in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, . The Apex Court held that instead and in place of

insurer, owner of vehicle shall be liable to satisfy the award. The court held that

though the amendment of 1994 made the insurer liable to pay compensation on behalf of the owner of the vehicle to the owner of the goods carried in the vehicle at the time of accident or his authorised representative, yet the amendment did not make room for the liability of insurer with respect to the passenger, especially gratuitous passenger who were neither contemplated at the time of contract of insurance nor any premium was paid to the extent of the benefit of insurance to such category of people. However, the law laid down in Baljit Kaur's case (supra), in view of legal proposition prevailing in wake of Satpal's case, was made prospective. The court after laying down the law on the subject of liability of insurer to pay compensation to a gratuitous passenger or his L.Rs. , proceeded to observe:

...The question, however, would be as to whether keeping in view the fact that the law was not clear so long, such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect...

11. In view of the aforesaid legal position, the law as regards gratuitous passenger cannot be applied in the present case inasmuch as the accident took place and the award was made much before the judgment in New India Assurance Co. Ltd. Vs. Asha Rani and Others, and National Insurance Co. Ltd. Vs. Baljit Kaur and Others, . The appellant's case that the appellant was prevented from establishing statutory defence available u/s 149(2), Motor Vehicles Act, by the Tribunal as his application for summoning the officer/official of the Licensing Authority and prove that the driver of offending vehicle was not holding an effective and valid driving licence at the time of accident was disallowed and that the award was to be set aside on this ground, does not sound convincing. It is pertinent to point out that the appellant filed an application for summoning the Record Keeper of the Licensing Authority, Amritsar (Pb) on 14.12.1999. Claim petitions were filed on 25.10.1997 and 16.10.1997. Claimants concluded their evidence on 29.12.1998. The appellant's evidence was closed on 6.7.1999. The appellant, a few months after its evidence was closed, came up with application for summoning the Record Keeper of Licensing Authority, Amritsar (Pb).

12. It needs to be recalled that the appellant in his objections to the claim

petition did not take a definite stand that the driver of offending vehicle was not holding valid and effective driving licence at the time of accident. The plea raised by the appellant, on the other hand, was more in the nature of an opinion of the appellant that it may escape the liability to pay compensation, if it was proved that the driver of offending vehicle was not holding valid and effective driving licence at the time of accident. The Tribunal in the said background and also noticing that the record available on the file indicated that the driver of the offending vehicle was holding valid and effective driving licence issued by the licensing authority vide DL No. 13675 dated 5.5.1989, renewed up to 2.2.1998, had rejected the belated prayer made by the appellant for summoning the witnesses.

Against the said backdrop, the refusal by the Tribunal to summon the record from the Licensing Authority, when claim petition was listed for final argument, cannot be held to make the award impugned in the appeal, liable to be set aside. The ground urged in the appeal that the respondents having failed to prove that the accident in question was attributable to the rash and negligent driving of the driver (late Avtar Singh) of the offending vehicle, the Tribunal, in view of the mandate of section 166 of the Act, was not justified in passing the award, is equally devoid of any substance.

13. The accident took place on NH 1-A at 156 km near Merog, Ramban. The claimants in two claim petitions were not present at the time of accident and cannot be presumed to have any personal knowledge as regards circumstances in which the accident took place. In the said background, the claimants cannot be said to have withheld any evidence relating to the circumstances in which the accident took place, from the Tribunal. In such a situation, the Tribunal has to rely on the outcome of investigation, if any, conducted by the local police. In the present case, the final police report No. 17 of 1997 indicated that the driver of offending vehicle was driving the vehicle rashly and negligently; that the offending vehicle turned turtle and fell down in a deep gorge. The Tribunal in such eventuality is to act on the principle of *res ipsa loquitur* and with the help of investigation report, arrive at just conclusion. In the present case, there was sufficient evidence before the Tribunal to conclude that the accident was caused due to rash and negligent driving by late Avtar Singh, driver of the offending vehicle. The appellant does not appear to have sought

permission for raising defence/plea in opposition to the claim petition, not contemplated by section 149(2), Motor Vehicles Act, and otherwise

available to the insured. In the circumstances, feeble effort made by appellant to question the award on the basis of quantum of compensation

cannot succeed.

C.I.M.A. No. 11 of 2001

14. The respondents admittedly laid a petition in terms of section 166, Motor Vehicles Act, 1988, though respondents had an option to fall back

on Workmen's Compensation Act, 1923 to claim compensation from the appellant. Even if respondents did not in the body of claim petition say in

so many words that the accident that claimed life of Avtar Singh, driver of the offending vehicle, was attributable to his rash and negligent driving,

yet their reliance on case F.I.R. No. 56 of 1997 under sections 279, 304-A, Ranbir Penal Code, made it clear that the accident was direct result

of rash and negligent driving of the offending vehicle by the deceased. It has been held in Oriental Insurance Co. Ltd. Vs. Premlata Shukla and

Others, and the principle of law reiterated in National Insurance Co. Ltd. Vs. Rattani and Others, , that once a document is relied upon in support

of the claim petition, the claimants cannot be heard insisting on its selective reliance on such document. The respondents, in the present case, relied

on copy of F.I.R. No. 56 of 1997, to prove factum of accident. They cannot be heard contending that reliance on F.I.R. be restricted to factum of

accident and death of Avtar Singh and not the cause of such accident, which the plain reading of F.I.R. suggests was rash and negligent driving of

the offending vehicle at the time of accident by the deceased. It is well settled law that a claim petition u/s 166, Motor Vehicles Act, is an action in

tort and the legal representatives of deceased have to establish by preponderance of probabilities that there was no negligence on the part of

deceased and that deceased was not responsible for the accident that claimed his life. Once the record available on the file establishes that the

deceased himself was a tortfeasor, his dependants cannot maintain a claim petition u/s 166 of the Motor Vehicles Act, 1988 and seek

compensation from the owner of the vehicle or insurance company that under the insurance policy is under a contractual obligation to indemnify the

owner. The reason for said legal proposition is not difficult to infer. The

dependants of tortfeasor cannot be allowed to reap the fruits of an actionable wrong that is attributable to the person, under whom they claim. However, law in such a case does not shut all doors on the dependants, to claim compensation. The dependants of deceased can maintain a claim for compensation under Workmen's Compensation Act, 1923. In a petition under Workmen's Compensation Act, the legal heirs of deceased workman have not to establish negligence as a pre-condition for award of compensation. In other words, the question whether any negligence was attributable to deceased is not relevant at all in a claim petition under the Workmen's Compensation Act, 1923. What is of pivotal importance in case of a claim petition u/s 3, Workmen's Compensation Act, is that injury is caused by an accident, arising out of and in the course of employment of workman. Once it is proved that the injury has been so caused in the course of employment of workman, all other matters relating to the accident recede to background, unless, of course, the case falls within ambit of proviso to section 3, Workmen's Compensation Act. So viewed, in the present case respondents would have been within their rights to maintain the claim petition under Workmen's Compensation Act.

15. The other course available to the respondents was to claim compensation u/s 163-A, Motor Vehicles Act, 1988. In terms of section 163-A(2) of the Act in any claim for compensation laid u/s 163-A(1) of the Act, the claimant is not required to plead or establish that the death in respect of which claim has been made, was due to any wrongful act or neglect or default of the owner of the vehicles or of any other person. However, in such case compensation awarded is to be in strict accordance with Second Schedule to the Motor Vehicles Act.

16. In the case in hand, as already pointed out, the respondents have neither filed a claim under Workmen's Compensation Act nor pressed into service section 163-A, Motor Vehicles Act. The claim petition is u/s 166 of the Motor Vehicles Act and ought to have been held to be not maintainable, giving liberty to respondents to fall back on section 163-A, Motor Vehicles Act. The Tribunal could have suo motu treated the claim petition as one u/s 163-A, Motor Vehicles Act, and proceeded with the matter. It hardly needs to be emphasised that there must be a visible element of compassion, in the mode and manner in which a claim petition under

the Motor Vehicles Act is dealt with. The Tribunal has to realize that the claimants before it are left high and dry by a tragic incident that they could not foresee so as to make arrangements well in advance for their sustenance in absence of their sole breadwinner. It is in the said background that the rules of pleadings and proof are held not to apply with same strictness in case of claim petitions as these are to apply in ordinary civil suits. In the present case the compassion on the part of Tribunal was not necessary as the witness brought on record that respondent No. 1 was an old and ailing man and had lost his eyesight. The Tribunal instead has gone ahead to try the matter and pass the award. The objection raised to the maintainability of claim petition has been rejected in cursory manner by the Tribunal, holding it to be maintainable in view of option available to respondents u/s 167, Motor Vehicles Act, 1988. It was least realized by the Tribunal that claim petition filed by respondent was to satisfy the requirements of section 166, Motor Vehicles Act, apart from its permissibility u/s 167 of the Act.

17. The vehicular accident in question has occurred about 14 years back. The award impugned in the appeal was passed on 31.10.2001. The respondents belong to disempowered, downtrodden, marginalised and unattended section of society. The course open to this court against the above backdrop must be guided not by technicalities but by the pitiable situation that confronts the respondents. It is nobody's case that respondents are not entitled to recover compensation from the appellant. The dispute relates to the remedy adopted by respondents to get the compensation. The respondents, as already stated, could very well maintain petition u/s 3 and/or 4, Workmen's Compensation Act, 1923 or at their option such a petition u/s 163-A, Motor Vehicles Act. If the respondents, because of non-availability of proper legal assistance, have pushed a wrong button, they cannot be deprived of the compensation that has legitimately come their way though through a remedy not available under law. The Tribunal, as already indicated, has awarded an amount of Rs. 3,12,500 to respondents. Had the respondents instead filed a claim petition under Workmen's Compensation Act, the compensation available in terms of section 4(1)(a) read with Explanation I and II and Schedule IV, a little more than what has been awarded would have been worked out--taking Rs.

4,000 as monthly wages received by deceased, and multiplying

50 per cent of the monthly wages by 213.57, i.e., 'relevant factor' applicable in the present case. The position would have been same had the

respondents filed a claim petition u/s 163-A, Motor Vehicles Act.

18. Viewed thus, it would be in the interest of justice not to interfere with the award rendered by the Motor Accidents Claims Tribunal more than

14 years back and relegate the respondents to the position as on the date of accident, forcing them to commence proceedings afresh for recovery

of the compensation. In the circumstances and for reasons discussed both the appeals--C.I.M.A. No. 10 of 2001 and C.I.M.A. No. 11 of 2001--

-are dismissed.

Interim direction, if any, shall stand vacated.

Record be sent down.