
(2012) 03 P&H CK 0481

In the Punjab And Haryana At Chandigarh

Case No : First Appeal from Order No. 1043 of 1991 with F.A.O. No's. 163, 164, 165 and F.A.O. No's. 724 and 725 of 1993.

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Meena Devi and Others

RESPONDENT

Date of Decision : 12-03-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 149, 149(2), 149(2)(a)

Citation : (2012) 166 PLR 629 : (2012) 2 RCR(Civil) 334 : (2012) 4 TAC 91

Hon'ble Judges : Hemant Gupta, J;A.N. Jindal, J

Bench : Division Bench

Advocate : Anand Chhibbar and Ms. Harpriya Khaneka,s in F.A.O. Nos. 1043 of 1991, 163, 164, 165 of 1993, Mr. J.S. Yadav,s in F.A.O. No. 724, 729 of 1993, for the Appellant; J.S. Yadav for the Respondents in F.A.O 1043 of 1991, 163, 164, 165 of 1993, Mr. Anand Chhibbar and Ms. Harpriya Khaneka for the Respondents in F.A.O. No. 724, 725 of 1993., for the Respondent

Judgement

Hemant Gupta, J.—This order shall dispose of afore-mentioned six appeals raising common question of law; as to whether the Insurance Company is liable to pay compensation in respect of injuries/death of the passengers travelling on the roof of the bus. The said appeals have been placed before us in view of the conflict of two judgments of this Court reported as *The New India Assurance Co. Ltd. v. The Samundri Roadways Co. Pvt. Ltd. and others*,¹ (1984)86 P.L.R. 689 and *New India Assurance Co. Ltd. v. Punjab Government and others*,² (1989-2)96 P.L.R. 568. Since the issue is legal, the facts, as are necessary for appreciating the question raised, are taken from FAO No. 1043 of 1991.

2. In the said case, Jai Pal (deceased) boarded the bus bearing registration No. HYM-1438 from Rewari to go to village Dhawana. The said bus was over-loaded and so Jai Pal and other passengers boarded the roof of the bus, which was driven by Hari Chand. The bus was being driven in a rash and negligent manner. When the said bus reached in the area of village Katopur, Rewari, on Rewari-Narnaul road, a rickshaw came from the opposite direction. The driver of the bus,

swerved the bus towards his left, as a result of which a branch of Banyan tree (Pipal) standing by the road side, hit the head of Jai Pal, who sustained injuries and later on succumbed to the same in Civil Hospital, Rewari.

3. During the course of evidence before the learned Motor Accident Claims Tribunal, Rewari (for short "the Tribunal"), PW-2 Amar Singh-a fellow passenger, deposed to the effect that the bus was over-loaded and 30/35 passengers were sitting on the roof of the bus. He deposed that near village Katopur, Rewari, a rickshaw was spotted coming from the Narnaul towards Rewari and to give passage to the rickshaw, the bus driver swerved the bus to the extreme left and a Banyan tree struck against the head of Jai Pal (deceased). On the basis of such evidence, the learned Tribunal recorded a finding that the driver of the bus was driving the bus in a rash and negligent manner. After returning such finding, the learned Tribunal awarded compensation of Rs. 1,80,000/- and interest at the rate of 12% per annum.

4. Before this Court at the time of motion hearing, learned counsel for the appellant relied upon a Single Bench judgment reported as *The New India Assurance Co. Ltd. v. The Samundri Roadways Co. Pvt. Ltd. and others*,¹ (1984)86 P.L.R. 689 that the Insurance Company is not liable to pay compensation in respect of death and injury of the passengers on the roof top of the bus. Later on, the appeal was admitted by the Division Bench, as the Bench noticed conflict with another judgment reported as *New India Assurance Co. Ltd v. Punjab Government and others*,² (1989-2)96 P.L.R. 568.

5. Learned counsel for the appellant has referred to *National Insurance Co. Ltd v. Anjana Shyam and others*, (2008-1)149 P.L.R. 179 (S.C), (v : 2007)7 S.C.C. 445 and *National Insurance Co. Ltd v. Cholleti Bharatamma and others*, (2008-1) 149 P.L.R. 315 to contend that the Insurance Company is liable to pay compensation in respect of the passengers, which a vehicle is permitted to carry. Since the passengers on the roof of the bus are not permitted, therefore, the compensation is not payable on account of injury or death to the passengers on the roof top. It is also argued that carrying of passengers on the roof top is violation of the policy conditions, therefore, the Insurance Company is not liable to pay compensation. It is argued that in the alternative, the Insurance Company should be given liberty to recover the amount from the owner in these proceedings in view of the judgments of Hon'ble Supreme Court reported as *Rameshwar Das Gupta Vs. State of U.P. and Another*, and *Oriental Insurance Co. Ltd. Vs. Shri Nanjappa and Others*, .

6. On the other hand, learned counsel for the claimants have relied upon number of judgments such as *New India Assurance Co. Ltd. Vs. Smt. Shanti Bai and others*, , wherein the compensation has been ordered to be paid on account of death of the passenger on the roof top as well as Full Bench judgment of Jharkhand High Court in *Girija Prasad Agrawal v. Parwati Devi and others*,⁸ 2005(3) R.C.R. (Civil) 702; the Division Bench judgments of Karnataka High Court in *Smt. Mayamma v. Siddaiah and others*,⁹ 2003(3) R.C.R. (Civil) 50, New

India Assurance Co. Ltd. v. Jayashree and others, 10 2010 A.C.J. 871 , Smt. Shivleela and Others Vs. Karnataka State Road Transport Corporation, ; a Division Bench judgment of Gauhati High Court in Oriental Insurance Co. Ltd. Vs. Member, MACT and Others, ; the Single Bench judgments of Rajasthan High Court in Rajasthan State Road Transport Corporation and Another Vs. Jamal Deen and Another, ; Madhya Pradesh High Court in Sundarbai and Another Vs. Laxminarayan and Others, ; Allahabad High Court in New India Assurance Co. Ltd. Vs. Hasina Begum and Others, ; Gujarat High Court in Oriental Insurance Co. Ltd. Vs. Gangaben Salambhai Nayak and Others, as also of this Court reported as Vijay Singh Vs. Haryana Roadways and another, and Manjit Kaur and Others Vs. Pepsu Road Trans. Corpn. and Others, .

7. We have heard learned counsel for the parties at length and find that the Insurance Company has been rightly made liable to pay compensation in respect of loss of life or injuries to the passengers.

8. A Single Bench of this Court in The Samundri Roadways Co. Pvt. Ltd. case (supra) has taken a view that travelling of a passenger on the roof of the bus is against the statutory provisions and that insurance agreement provides that the insured shall take reasonable precautions to prevent the accidents and shall comply with all statutory obligations. It was, thus, held that by permitting the deceased to travel on the roof of the bus, its conductor did not take reasonable precautions to prevent the accident, but he also failed to comply with the requisite statutory obligations. Since there was violation of the terms of the insurance policy, the insurance company is not liable to pay compensation.

9. In New India Assurance Co. Ltd case (supra), another Single Bench of this Court noticed that the ratio of the judgment in The Samundri Roadways Co. Pvt. Ltd. case (supra) has not been approved by the Hon'ble Supreme Court, as it was held that immunity clause will be attracted if the insurer proved a breach of a specified condition of the policy. Since there is no proof of any condition in the insurance policy, it was held that the Insurance Company is not absolved of its liability.

10. In Vijay Singh's case (supra), the question examined by the single judge of this court was as to whether the travelling on the roof of the bus, per se constitute contributory negligence on the part of such passenger. Such question was answered to return a finding that there is no contributory negligence. It was held to the following effect:

6. There is a duty of care that rests upon the driver of a bus towards all persons travelling on it which covers not only those in it, but extends also to passengers travelling on the roof of it, even though it may not have been permissible in law for them to be there. Breach of any rule or instruction prohibiting travel on the roof of a bus cannot be construed as a licence to the bus-driver to drive the bus but without due regard to the care and safety of all passengers including those on the roof. Rather, when there are passengers on the roof, extra-caution is

imperative. These observations are, of course, not to be taken as approving or permitting travel on the roof of a bus. It is clearly incumbent upon the authorities concerned to ensure that travel on the roof of a bus is not only banned, but does not in fact take place as a risk of serious injury, is so obviously inherent in such travel.

7. Seen in this light, no contributory negligence can be fastened upon a passenger travelling on the roof of a bus, who sustains injuries on account of the negligent driving of the bus-driver, merely on the ground that he had been travelling on the roof of the bus and not inside it. In this view of the matter, the finding of contributory negligence recorded against the claimant cannot be sustained and is, thus, set aside.

8. As regards the bus-driver, there can be no escape from the conclusion that he was indeed negligent in not taking due care to safeguard the safety of persons travelling even on the roof of his bus. The over-head hanging wires were clearly visible to him and having seen them, it was not only possible but incumbent upon him to see to it that no harm was caused by them to any person in the bus. Breach of this duty of care on the part of the bus-driver is thus writ large. The accident must accordingly be held to have been caused wholly and entirely due to the negligence of the bus-driver.

11. In Manjit Kaur's case (supra) again the finding on contributory negligence was set aside even though the deceased was a passenger on the roof top.

12. In Shanti Bai's case (supra), no argument was raised on behalf of the Insurance Company before the Hon'ble Supreme Court to deny its liability in respect of compensation payable in respect of passenger on the roof top. It was argued that the Insurance Company has a limited liability in respect of 50 passengers. It was found that premium paid is in respect of the statutory liability and that the liability of the Insurance Company is limited to fifteen thousand rupees in terms of Section 95(1)(b)(ii) of the Motor Vehicles Act, 1939, as was then applicable.

13. The Full Bench of Jharkhand High Court in Girija Prasad Agrawal's case (supra) examined Section 149(2) of the Motor Vehicles Act, 1988 and reached to the following conclusion:

32. After giving my anxious consideration on the provisions of law and ratio decided by the Supreme Court in the decisions referred to hereinabove, I come to the following conclusion:

(i) Carrying passengers more than covered by the Insurance Policy though amounts to committing breach of terms of policy, the Insurance Company cannot be absolved from its liability to pay compensation with respect to the persons exceeding the number covered by the policy. In case, Insurance Company is permitted to raise defence of limited liability on the basis of terms of policy, object of Section 147 would stand frustrated. Even otherwise, alleged breach of

terms of policy by the insured, may be an offence under the provisions of the Act, but surely that does not fall u/s 149(2)(a) of the Act.

(ii) The insurer can avoid its liability only if the conditions specified in Section 149(2) are satisfied, and not otherwise. The statute recognizes no other condition for an insurer to escape his liability except those given in Section 149(2) whatever the terms and conditions between the insurer and the insured may be. The terms of contract between the insured and the insurer determining their rights and liabilities towards each other, are not and should not be confused with the statutory liability of the insurer for the third party risk. If there is a breach of contract on the part of the insured, the insurer may proceed against the insured. As far as third party risk is concerned, the liabilities being statutory, it cannot be overridden by terms of the contract of insurance between the parties.

14. The Division Bench of Karnataka High Court in Smt. Mayamma's case (supra) has made the Insurance Company liable to pay compensation, when the following finding was recorded:

3. We have very carefully evaluated the rival arguments canvassed before us and we do find that there is something to be said in respect of both points of view. While the respondents' learned counsel may be right to the extent of pointing out that the deceased was on the wrong side of the law the moment he travelled on the top of the bus, there is an equally valid contention raised by the appellant's learned counsel that once the bus staff permitted these persons to travel on the top or rather once they condoned it, then a corresponding obligation arose vis-a-vis the driver particularly to ensure that due care and caution is taken in order to avoid injury or death to those persons travelling on the top. The simplest example that we could cite would be a situation whereby the bus was required to approach rather low over-bridge and where it would be very obvious to the driver that if he were to drive through that bridge, all these who are sitting on top would most certainly be injured and probably killed. The fact that they were on the wrong side of the law would not entitle the driver to proceed under these circumstances because the law would make it obligatory on the part of the driver to stop the bus and ensure that these persons move from that position as it was quite certain that they would suffer serious injury or death if this course of action is not observed. The fact that the deceased was on the roof would still not absolve the driver from his duty and in our considered view, his having ignored this aspect and having driven the bus in such a manner that the deceased came in contact with the telephone wire and got wrenched off the top of the bus is sufficient to fasten a corresponding negligence on the driver. We do concede that this is an unusual case and we do concede that it is for this reason that the law has also required to be stretched or innovated to some extent but the objection is that the decision is required to be fair to both the parties."

15. Similar view was reiterated by the later Division Benches of the same Court in Jayashree and Shivleela's cases (supra). Still another Division Bench of

Gauhati High Court in Oriental Insurance Co. Ltd. case (supra) has taken the same view. So was the view taken by Rajasthan, Gujarat and Madhya Pradesh High Courts as well.

16. Now coming to the judgment in Anjana Shyam's case (supra) referred to by the learned counsel for the appellant, we find that the reliance on the said judgment does not help the argument raised. In the aforesaid case, as against the carrying capacity of 42 passengers including driver and conductor, the bus was carrying 90 passengers including on roof top. The Hon'ble Supreme Court observed that in terms of Section 149 of the Motor Vehicles Act, 1988, the duty of the insurer is only to satisfy judgments and awards against persons insured in respect of the third party risk and that the liability of the insurer is to pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder. The Hon'ble Supreme Court, thus, held that the liability of the Insurance Company would be to pay compensation awarded to 42 passengers out of the 90 passengers and that the higher of the 42 awards will be taken into account and it would be the sum total of those higher 42 awards that would be the amount that the insurance company would be liable to deposit.

17. In view of the said judgment and the consistent view of various High Courts including the Hon'ble Supreme Court, we have no hesitation to hold that traveling on the roof top of the bus, does not absolve the Insurance Company of its liability. The judgment of this court in Samundri Roadways Co. Pvt. case (supra) is contrary to number of judgments mentioned above, therefore, it does not lay down good law. We are of the opinion that the Insurance Company is liable to indemnify the insured to pay the compensation even in respect of the claims arising out death or injury suffered by the passengers travelling on the roof top.

18. In the present case, one passenger lost his life. Therefore, the liability of the Insurance Company in respect of such passenger is unlimited. Thus, the Insurance Company is liable to satisfy the entire award, as it falls within the maximum sum of compensation, which the Insurance Company has undertaken to pay in respect of passengers.

19. Consequently, we do not find any merit in the appeals filed on behalf of the Insurance Company. The same are accordingly dismissed.

20. FAO Nos. 724 and 725 of 1993 have been filed by the legal heirs of the deceased Ashok Kumar, aged 18 years and Siria Singh-injured, respectively arising out of the same accident.

21. A perusal of the record of FAO No. 725 of 1993 shows that before the Lok Adalat on 08.09.1999, the Insurance Company at one stage agreed for enhancement of compensation of Rs. 90,000/- from Rs. 65,000/- awarded by the Tribunal. However, the said order was recalled on 30.08.2000 in view of the fact that the appeals preferred by the Insurance Company were stated to be pending before this Court.

22. Appellant-Siria Singh has suffered 25% permanent disability on account of shortening of leg by 02 inches. Therefore, we find that the total amount of compensation of Rs. 1,00,000/- would meet the ends of justice. The appellant shall also be entitled to interest at the rate of 10% per annum from the date of filing of claim application till its realization.

23. Similarly, a perusal of the record of FAO No. 724 of 1993 shows that before the Lok Adalat on 08.09.1999, the Insurance Company at one stage agreed for awarding compensation of Rs. 1,00,000/- as against Rs. 40,000/- awarded by the Tribunal, but the said order was recalled on 30.08.2000 in view of the fact that the appeals preferred by the Insurance Company were stated to be pending before this court on an application filed by the Insurance Company. Keeping in view the facts and circumstances of the case, we find that the total amount of compensation of Rs. 1,00,000/-, as agreed by the Insurance Company earlier, would meet the ends of justice. The amount of compensation shall be paid to the appellants i.e. father-Hem Raj and brother-Darshan Singh in equal shares. The appellants shall also be entitled to interest at the rate of 10% per annum from the date of filing of claim application till its realization.

With the said observations, all the appeals are disposed of.