

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. : 448 of 2018
a/w FAO No. 34 of 2019

Reserved on: 23.04.2025

Decided on: 30.04.2025

1.FAO No. 448 of 2018

The Oriental Insurance Company Ltd.

....Appellant.

Versus

Sh. Sheru @ Sher Singh @ Sukhraj and Ors.

...Respondents.

2.FAO No. 34 of 2019

Sh. Sheru @ Sher Singh @ Sukhraj.

....Appellant.

Versus

Sh. Amba Dutt and Ors.

...Respondents.

Coram

The Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting?¹ Yes

FAO No. 448 of 2018

For the appellant(s) : Mr. Jagdish Thakur, Advocate,
for the appellant.

¹ Whether reporters of the local papers may be allowed to see the judgment?

For the respondent(s) : Mr. Dheeraj K. Verma, Advocate,
for respondent No.1.

: Mr. Abhishek Nagta, Advocate,
vice Mr. Parmod Singh Thakur,
Advocate, for respondent No.2.

: Mr. Bhisham Sharma, Advocate,
vice Mr. Inderjeet Singh Narwal,
Advocate, for respondent No.3.

FAO No. 34 of 2019

For the appellant(s) : Mr. Dheeraj K. Verma, Advocate,
for the appellant.

For the respondent(s) : Mr. Abhishek Nagta, Advocate
vice Mr. Parmod Singh Thakur,
Advocate, for respondent No.1.

: Mr. Bhisham Sharma, Advocate,
vice Mr. Inderjeet Singh Narwal,
Advocate, for respondent No.2.

: Mr. P.S. Chandel, Advocate, for
respondent No.3.

Satyen Vaidya, Judge

Both these appeals are being decided
by a common judgment as these arise from the
same award.

2. The impugned award dated
08.05.2018, in MAC Case No. 19-S/2 of 2016,
has been passed by learned Motor Accident

Claims Tribunal, Shimla, H.P. (for short, 'the Tribunal') in a petition under Section 166 of the Motor Vehicles Act, 1988 (for short "Act"), filed by the injured Sheru @ Sher Singh (for short "Claimant") on account of injuries and consequent disablement suffered by him in a motor vehicle accident.

3. The claim petition was filed on the premise that on 31.08.2015 at about 4:00 AM an accident involving vehicle No. HP-13-0878 took place near Dharampur, District Solan, H.P. As per claimant, he was one of the occupants of the vehicle and as a result of accident, he had suffered injuries and resultant disablement to the extent of 45 %.

4. The vehicle was stated to be owned by Amba Dutt (hereinafter referred to as the "owner"). It was alleged that at the time of accident, the vehicle was being driven by Rakesh Kumar, (hereinafter referred to as the "driver") in rash and negligent manner which resulted in a

collision between the aforesaid vehicle and stationary/parked truck on the road.

5. The vehicle was stated to be insured by Oriental Insurance Company (hereinafter referred to as the “insurer”).

6. The claimant had alleged that he was working as a Porter/labourer. The offending vehicle was carrying apple boxes from Gumma in District Shimla to Parwanoo in District Solan, H.P. and claimant was traveling in the capacity of a Porter alongwith owner of the apple boxes named Devender Kumar.

7. The owner in his reply filed to the claim petition contended that he had sold the vehicle in question to the driver on 24.07.2015 and thus, he was not liable either to be impleaded as a party or to pay the compensation.

8. The driver also filed his separate reply. He denied the allegations of being rash and negligent at the time of accident. He admitted

that the claimant was traveling in the vehicle as Porter alongwith Devender Kumar.

9. The insurer also filed its separate reply and alleged violation of terms and conditions of the policy. Objection was raised that the driver was not possessing a valid driving license at the time of accident. The liability was also sought to be avoided on the ground that the claimant was traveling in the vehicle as a gratuitous passenger.

10. Learned Tribunal had framed the following issues-

- “1. Whether claimant Sh. Sheru, has sustained injuries in a road side accident on 31.08.2015, involving vehicle No. HP-13-0878 being driven by respondent No.2 in a rash and negligent manner? OPP.*
- 2. If issue No.1 is proved in affirmative, for what amount of compensation, the claimant is entitled and from whom? OPP.*
- 3. Whether the claim petition is not maintainable? OPR.*
- 4. Whether the claimant has no cause of action to file the present claim petition against the respondent No.1, if so its effect? OPR-1*

5. *Whether the claimant has not approached to this Tribunal with the clean hands? OPR-1.*
6. *Whether the driver of the vehicle was not having a valid and effective licence to drive the vehicle at the time of accident, if so its effect? OPR-3.*
7. *Whether the vehicle No. HP-13-0878 was permitted to ply in violation to the terms and conditions of the insurance policy, as well as, to the provisions of Motor Vehicles Act, if so its effect? OPR-3.*
8. *Relief.*

Issues No. 1 and 2 were decided in affirmative and remaining issues in negative. The claim petition has been allowed by awarding total compensation of Rs. 18,42,711/- alongwith interest @ 7.5 % from the date of filing of claim petition, till realization of the whole amount. The cost of the petition has also been assessed at Rs. 5,000/-.

11. FAO No. 448 of 2018 has been filed by the insurer assailing the impugned award on the ground that it could not have been held liable to pay compensation as the claimant was proved to be a gratuitous passenger. It has also been

contended that the driver was also proved to be not possessing effective and valid driving license at the time of accident.

12. FAO No. 34 of 2019 has been filed by the claimant by alleging that he has not been adequately compensated for the disablement suffered by him.

13. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

14. The facts which have not been disputed by the parties before this Court are that the claimant was working as a Porter/Laborer. He was 35 years old at the time of accident. The claimant was traveling in the vehicle as a Porter alongwith owner of the apple boxes carried in the vehicle. The claimant had suffered disablement to the extent of 45% (locomotor).

15. The finding returned by learned Tribunal holding claimant to be an authorized passenger has seriously been disputed by the

insurer. On the other hand, the claimant alongwith owner and driver have supported such finding. It has been argued that claimant was travelling in the vehicle as a porter alongwith apple box. The owner of the goods was also the occupant of the same vehicle. In alternative, the claimant has been said to be travelling in the vehicle as authorized representative of the owner of goods.

16. In order to assess the nature of vehicle involved in the accident, though, its registration certificate has not been placed or proved on record, nonetheless, the other material available on record clearly suggests that the vehicle involved in the accident was a goods carriage. The Goods Carriage has been defined in section 2(14) of the Act as under:-

“(14) “goods carriage” means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods.”

16.1 The policy of insurance Ext. RW1/A divulges the insured vehicle to be an EICHER MCV 10.95 (Tipper) with Gross Vehicle Weight (GVW) 9500 which means the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle. As per the Act, vehicle with GVW above 12000 Kilograms are termed as Heavy Goods Vehicle and with GVW not exceeding 7500 Kilograms are terms as Light Motor Vehicle. The vehicle in question herein will, thus, fall in the category of Medium Goods Vehicle as defined in Section 2 (23) of the Act which reads as under:-

“(23) “medium goods vehicle” means any goods carriage other than a light motor vehicle or a heavy goods vehicle.”

16.2 Even otherwise, it is admitted case of the parties that the vehicle was carrying apple boxes for being transported from Gumma to Parwanoo with the owner of the goods Devender

Kumar on board. Thus, undoubtedly the offending vehicle was a goods carriage vehicle.

17. Now to see whether the claimant will be entitled for coverage of the policy of insurance, his status while travelling in the goods carriage vehicle has to be ascertained.

17.1 The term “any person” used in Section 147 of the Motor Vehicles Act, relates only to a third party and a passenger in goods carriage vehicle is not a third party. The insurer would only be liable to indemnify the owner either in respect of claim arising out of death or bodily injury to third party or to the owner of the goods or his authorized representative, or the employee of the owner of the vehicle, who fall within the category provided in Section 147 of the Act.

17.2 The claimant will not fall in any of above categories.

17.3 It is the admitted case of the claimant, owner and driver that the claimant was travelling in the vehicle at the time of accident as a Porter.

It has also been proved that the owner of the apple boxes carried in the vehicle was also travelling in the same vehicle. Even as per findings recorded by learned Tribunal while answering issue no. 7 it has been held that the claimant was travelling as a Porter of the goods alongwith Devender Kumar.

17.4 Section 147 of the Act contemplates either the owner of the goods or his authorized representatives and since in the facts of the case, the owner of goods himself was travelling in the goods carriage at the time of accident, the claimant could not be his representative.

17.5 Claimant at the most can be said to have been engaged by Devender Kumar as a porter/labourer for facilitating the transportation of apple boxes. In such capacity also he will again not fall in any of the categories of persons detailed in Section 147 of the Act. Reference can be made to judgment passed by Hon'ble Supreme Court in ***Sanjeev Kumar Samrat Vs. National***

Insurance Co. Ltd. and Ors. (2014) 14 SCC

243, wherein it has been held as under:-

“18. Keeping in view the aforesaid enunciation of law, it is to be seen how the term “employee” used in Section 147 of the Act is required to be understood. Prior to that, it is necessary to state that as per Section 147(1)(b)(i), the policy is required to cover a person including the owner of the goods or his authorised representative carried in the vehicle. As has been interpreted by this Court, an owner of the goods or his authorised agent is covered under the policy. That is the statutory requirement. It does not cover any passenger. We are absolutely conscious that the authorities to which we have referred to hereinbefore lay down the principle regarding non-coverage of passengers. The other principle that has been stated is that the insurer's liability as regards the employee is restricted to the compensation payable under the 1923 Act. In this context, the question that has been posed in the beginning to the effect whether the employees of the owner of goods would come within the ambit and sweep of the term “employee” as used in Section 147(1), is to be answered. In this context, the proviso to Section 147(1)(b) gains significance. The categories of employees

which have been enumerated in clauses (a), (b) and (c) of proviso (i) to Section 147(1) are the driver of a vehicle, or the conductor of the vehicle if it is a public service vehicle or in examining tickets on the vehicle, if it is a goods carriage, being carried in the vehicle. It is submitted by the learned counsel for the appellant that clause (c) of proviso (i) is of wide import as it covers employees in a goods carriage being carried in a vehicle. The learned counsel for the insurer would submit that it should be read in the context of the entire proviso, regard being had to the schematic concept of the 1923 Act and the restricted liability of the insurer. It is further urged that contextually read, the meaning becomes absolutely plain and clear that employee which is statutorily mandated to be taken by the insured only covers the employees employed or engaged by the employer as per the policy.

19. *It is the settled principle of law that the liability of an insurer for payment of compensation either could be statutory or contractual. On a reading of the proviso to sub-section (1) of Section 147 of the Act, it is demonstrable that the insurer is required to cover the risk of certain categories of employees of the insured stated therein. The insurance company is not under statutory obligation to cover all kinds of*

employees of the insurer as the statute does not show command. That apart, the liability of the insurer in respect of the said covered category of employees is limited to the extent of the liability that arises under the 1923 Act. There is also a stipulation in Section 147 that the owner of the vehicle is free to secure a policy of insurance providing wider coverage. In that event, needless to say, the liability would travel beyond the requirement of Section 147 of the Act, regard being had to its contractual nature. But, a pregnant one, the amount of premium would be different.”

17.6 The claimant, can also not fall in the category of employee of the owner of the goods carriage in light of material on record as discussed above.

18. Thus, the claimant was an authorized and gratuitous passenger travelling in a goods carriage vehicle. The insurer cannot be held liable to indemnify the insured.

19. It has also been contended on behalf of the insurer that the driver was without a valid

and effective driving license at the time of accident.

19.1 The vehicle in question was a transport vehicle as per section 2(47) of the Act, which reads as under:

“(47) “transport vehicle” means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.”

19.2 The statutory requirement to hold specific driving license to drive transport vehicle is manifested from section 3 of the Act which reads as under:

*“3. Necessity for driving licence.—(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle;
and no person shall so drive a transport vehicle [other than [a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.
(2) The conditions subject to which sub-section (1) shall not apply to a person*

receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.”

19.3 Learned counsel for insurer while placing reliance on the statement of witness RW-6 has contended that the driver was not authorized to drive transport vehicle at the time of accident. RW-6 is an official from the office of Registering and Licensing Authority, Shimla. This witness has produced the abstract of driving license Ext. RW6/A and has further deposed that as per record, the holder of this license was authorized to drive transport vehicle from 27.09.2017 to 26.09.2020. The driver has not disputed the abstract of driving license Ext. RW6/A to be relatable to him. Rather, he himself tendered abstract of his driving license as Ext. RW5/B and copy of the driving license as Ext. RW5/C. The document Ext. RW5/B produced by the driver is the same as the abstract of driving license Ext. RW6/A produced by RW-6.

19.4 The document Ext. RW5/C reveals the date of issuance as 05.05.1995 with its validity for non-transport vehicle till 15.06.2025 and for transport vehicle till 26.09.2020. The accident had taken place on 31.08.2015. The question is whether on the date of accident the driver had license to drive the transport vehicle?

19.5 The driving licence Ext. RW-5/C reveals the date of endorsement for authorising driving of transport vehicle as 14.11.2017. If the contents of this document are read in conjunction with Ext. RW5/B and Ext. RW6/A, it becomes evident that the driver was authorized to drive the transport vehicle w.e.f. 27.09.2017 to 26.09.2020. Though, in these documents, the history of previous endorsement is reflected but there is no revelation as to authorization, if any, of driver to drive the transport vehicle on the date of accident i.e. 31.8.2015.

20. Learned Tribunal has held that the insurer had not been able to discharge its burden

as RW6 had stated in his examination-in-chief that he was not aware whether the driver was authorized to drive the transport vehicle prior to 27.09.2017. The absence of any endorsement to that effect in document Ext. RW5/B and Ext. RW6/A have also been held to be not sufficient to draw an adverse inference against the driver. However, this Court finds itself unable to concur with the findings recorded by learned Tribunal to above effect. The insurer could not have proved a fact in negative. It had discharged its initial onus by producing RW-6 and exhibition of document Ext. RW6/A. As noticed above, the driver did not claim to be holder of any other license. Once, the insurer had brought on record the fact that license of driver had endorsement to drive transport vehicle for the period 27.09.2017 to 26.09.2020 and not before that, it was for driver to rebut by proving the fact that on the date of accident also he was holding license to drive transport vehicle.

21. Thus, it is held that the driver cannot be said to be the holder of a valid driving licence on the date of accident and the findings to the contrary recorded by learned Tribunal are set aside.

22. Learned counsel for the insurer has further raised the contention that the insurer otherwise also could not be held liable to indemnify the insured on account of another serious violation of the terms of the policy. According to him, the owner had raised a plea that he had already transferred the vehicle to the driver prior to the date of accident. The driver while being examined as RW-5 has also admitted said fact. The transfer having been made without the consent and knowledge of insurer will not bind it for any purpose whatsoever.

22.1 The above contention on behalf of the insurer needs to be rejected for the reason that as per own saying of the owner, the transfer was not complete on the date of accident. The owner

has taken a categorical stand that “No Objection Certificate” was issued for transfer of vehicle by the concerned Registering Authority much after the date of accident.

22.2 In addition, the policy of insurance Ext RW1/A divulges that the policy was effective for the period 30.07.2015 to 29.07.2016. As per contents of said document, the policy was purchased on 29.07.2015. It was produced in the name of the owner Amba Dutt. Thus, it is evident that the owner Amba Dutt was the registered owner of the vehicle even as on 29.7.2015 i.e. the date of the purchase of the policy. The version of the owner that he had sold the vehicle to the driver on 24.07.2015 clearly stands falsified by the above piece of evidence. There also is nothing to suggest that on the date of accident, the status as to ownership of the vehicle had changed.

23. As regards the quantum of compensation awarded, this Court sees no

illegality or perversity in the impugned award save and except the assessment of functional disability of the claimant to the extent of 60%.

23.1 The claimant was proved to be a labourer. He had also produced a witness, who claimed that the claimant was skilled to operate Jack-hammer. As per notification dated 23.07.2016 issued by Labour and Employment, Department under the Minimum Wages Act, the wages payable to unskilled worker were Rs. 200/- per day and in respect of a skilled worker, it was Rs. 304.50/- per day. Learned Tribunal has applied guess work for assessing the monthly income of the claimant at Rs. 8,000/-, which cannot be said to be unreasonable. It cannot be ignored that the minimum wages are fixed for limited and specified working hours. It is also a common knowledge that private worker normally works over time. In the instant case, claimant was 35 years old, when he suffered disablement. In these circumstances, no interference is

required with the assessment of his monthly wages by learned Tribunal.

24. The multiplier of 16 has also rightly been applied.

25. Learned Tribunal has also been right in making addition of 40% to the monthly income of claimant on account of loss of future prospects. The view has support of judgment passed by Hon'ble Supreme Court in the case of ***Pappu Deo Yadav Vs. Naresh Kumar and others reported in AIR 2020 SC 4424.***

26. The compensation awarded to the claimant by learned Tribunal under other conventional and non-conventional head is also fair and just.

27. I have not been able to find medical or any other legal evidence on record to subscribe to the view taken by learned Tribunal while holding the claimant to have suffered functional disability to the tune of 60%. The experts have certified the disability to the extent of 45%. For assessment of

functional disability to be different than the physical disability of victim there must exist some objective criteria and the same has to be reflected from the facts proved on record. In the case at hand assessment on any such criteria is completely missing. The subjective considerations cannot be used as parameters to assess functional disability.

27.1 Thus, the monthly loss of earning in the case of claimant has to be assessed at Rs. 5040/- (@ 45%) instead of Rs. 6720/- per month (@ 60%). Accordingly, the compensation under this head will be $5040 \times 12 \times 16 = \text{Rs. } 9,67,680/-$ only and the total payable compensation, including all other amounts awarded by learned Tribunal, shall be Rs. 15,20,151/-.

27.2 The claimant shall be entitled to simple interest @ 7.5% per annum on the entire amount of Rs. 15,20,151/- from the date of filing of petition i.e. 9.6.2016 till the date of actual

realization of entire amount. The cost as awarded by learned Tribunal shall remain.

28. Learned counsel for the claimant has not been able to substantiate his plea that the compensation awarded to the claimant by learned Tribunal is not just and fair or is on the lesser side.

29. Learned counsel for the claimant and owner have also raised an argument that in case the insurer is not held liable to indemnify the owner, still it should be directed to satisfy the award in the first instance and then to recover the same from the owner.

30. On the other hand, learned counsel for the insurer has submitted that in case of gratuitous passenger such a benefit cannot be granted to the owner.

31. In order to appreciate the rival submissions, it is important to notice that the claimant in the instant case has been proved to be an unauthorized or gratuitous passenger in a

goods carriage. He is not the third party. He also is not one of the persons who is entitled for statutory coverage of insurance in terms of Section 147 of the Act. The owner has not proved that he had paid any additional premium to the insurer or had entered into a contract with insurer under which such coverage could be provided to the claimant.

31.1 In result, the case is clearly distinguishable with the case of a third party where the violation is only with respect to the validity or existence of driving license. In that situation, one of the contracting party is not violator of the very foundational base of the contract of insurance. The differentiation in two situations can be marked for the reason that in the former case of non-existence or non-holding of the driving license there still is a subsisting contract of insurance covering the risk of third party but in the other there is no contract covering the risk as no premium has been

charged or paid for person not covered under the categories defined under section 147 of the Act or by a special contract.

32. Thus, the contention so raised merits rejection for the reason; firstly that there is no provision in the Act which allows the insurer to pay in the first instance and recover later from the insured where the claim relates to gratuitous passenger in a Goods Carriage Vehicle and secondly in view of the law settled in ***New India Insurance Company Ltd. Vs. Asha Rani, 2003 ACJ (1), National Insurance Co. Vs. Baljeet Kaur, 2004 ACJ 428***. Both these judgments by three judges' benches expounded the law with respect to liability of insurer to indemnify the insured in respect of claims arising out of death or bodily injury to a gratuitous passenger in a Goods carriage Vehicle and held in favour of insurer. Hon'ble Supreme Court in ***National Insurance Company Ltd. Vs. Parvathneni in (2018) 9 SCC 657*** has kept the question of law

open on the issue whether the Supreme Court in exercise of powers under Article 142 of the Constitution can direct the insurer to pay and recover, where the liability otherwise does not arise in case of gratuitous passenger. This court while expressing above view has drawn support from judgment passed by a Division Bench of High Court of Judicature at **Madras in Bharti AXA General Insurance Co. Ltd. Vs. Aandi reported in 2019 ACJ 1975.**

33. In view of above discussion, FAO No. 448 of 2018 is allowed. It is held that the insurer is not liable to indemnify the insured. The owner Amba Dutt is held liable to satisfy the award. The quantum of award is also modified to the extent as held above.

34. FAO No. 34 of 2019 is dismissed.

35. The impugned award dated 8.5.2018 passed by learned Motor Accident Claims Tribunal Shimla in MAC Case No. 19-S/2 of 2016 shall stand modified to the extent as held above.

36. Both these appeals are, accordingly, disposed of, so also the pending miscellaneous application(s), if any.

30th April, 2025
(*sushma*)

(Satyen Vaidya)
Judge

