

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU.

CIMA Nos. 71/2006, 72/2006, 326/2006, 39/2006,
29/2007, 40/2007 and 330/2006

Date of order:27.07.2011

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| 1. Oriental Insurance Co. Ltd. | v. | Sunita Devi and ors. |
| 2. Oriental Insurance Co. Ltd. | v. | Sunita Devi and ors. |
| 3. Oriental Insurance Co. Ltd. | v. | Bindra Devi and ors. |
| 4. Oriental Insurance Co. Ltd. | v. | Sunita Devi and ann. |
| 5. Oriental Insurance Co. Ltd. | v. | Asha Devi and ors. |
| 6. Oriental Insurance Co. Ltd. | v. | Om Devi and ors. |
| 7. Oriental Insurance Co. Ltd. | v. | Bindra Devi and ors. |
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Coram:

Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge

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| 1. Whether approved for Law Journal? | Yes |
| 2. Whether approved for publication in Press? | |
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Appearing counsel:

For petitioner(s): Mr. Vishnu Gupta, Advocate

For respondent(s): M/s V. B. Gupta and Vinod Kotwal, Advocates

2nd of September, 1999 proved to be most unfortunate day for the respondents/claimants as in the case of two sets of claim petitions the parents of the claimants lost their lives and some other claimants suffered injuries because of accident of vehicle bearing no. HP-46-0645 near Pati Nallah Barmour, (H.P.) which

was stated to be negligently driven by the driver of the vehicle. The claim petitions were filed under Sections 166 and 140 of Motor Vehicles Act, 1988 (for short "Act of 1988") before the Motor Accidents claim Tribunal, Baderwah, (for short MACT).

In the claim petitions, it was pleaded that death was caused because of negligent driving of the driver. Learned MACT passed an award of Rs. 50,000/- under Section 140 of the Act of 1988. The award passed in the claim petition was not challenged by the appellants.

The appellant-insurance company took factual stand at paragraph D and E under the caption of preliminary objections filed before the learned MACT. The said paragraphs are reproduced as under:

"d. That at the time of alleged accident the vehicle was over loaded as much as roof of the vehicle was full with passengers and even the stairs-foot rest and laps of the sitting passengers were occupied and full and this being a violation of the terms and conditions of the insurance policy, breach of conditions of route permit and also contrary of the Motor Vehicle Act and its Rules. In these circumstances, the insurance company cannot be held liable to pay any compensation or to indemnify the insured in such the insured and its driver are liable for payment of

compensation if, any for his illegal and criminal behaviour.

e. That the vehicle under its route permit was permitted to carry only passengers in accordance to the sitting capacity of vehicle including Driver and Conductor. The insurance company have undertaken to indemnify the insured to the extent of liability in respect of the only passengers in accordance to the sitting capacity, if there are no violations or breach of conditions of the insurance policy and route permit. Otherwise also the liability of the insurance company, if any, is limited to the extent and not beyond."

This is the stand which is taken by the appellant- insurance company in all the claim petitions.

On the pleadings of the parties in one set of the claim petition following issues were framed:

1/- Whether on 2.9.99 deceased Mohan Lal died at village Pati Barmohar (HP) due to accident while traveling in vehicle No. HP-46-0645 from Barmor to Chamba, which was being driven by its driver rashly and negligently? OPP

2/- To what amount of compensation the petitioners are entitled and from whom? OPP

3/- Whether the vehicle was over loaded at the time of accident and the driver of said vehicle has breached the conditions of insurance policy? OPR1

4/- Relief."

And in another set of claim petitions following issues were framed:

1/- Whether load carrier bearing No. HP-46-0645 met with an accident at Barmour while coming from Chamba due to rash and negligent driving, resulting in death of Uttma Devi alais Uttra Devi who was also traveling in the same along with other passengers? OPP

2/- In case issue No. 1 is proved to be affirmative, to what extent petitioners are entitled to compensation and from whom? OPR

3/- Whether the ill fated load carrier was permitted to carry passengers if so, what is its effect? OPR1

4/- Whether petitioners are disentitled to the claim of compensation for breach of conditions of insurance policy and Motor Vehicle act as mentioned in para D and E of objections, filed by respondent no. 1?OPR1

5/- Whether driver of the ill fated load carrier was driving it without a valid driving licence, if so what is its effect?OPR1”

Claimants alone lead evidence in support of their claim to prove the aforementioned issues whereas insurance company and the owner did not lead any evidence to prove the issues of which burden was on them.

Learned MACT after considering the matter and hearing the learned counsel for the parties passed award in all the seven cases which awards are in challenge in these appeals.

As common questions of law and fact are involved, these appeals have been considered and heard together and are being disposed of by this common judgment.

Mr. Vishnu Gupta learned counsel appearing for the appellant-insurance company submitted that vehicle in which the deceased and injured were traveling was not a passenger vehicle but was a goods vehicle and the owner and driver were not authorized to carry the passengers in the said vehicle. Learned counsel submitted that copy of insurance policy which has been placed on record does show that the vehicle was a goods vehicle and owner and driver were authorized to carry seven employees/laborers in the said vehicle. Learned counsel submitted that there being total breach of the terms and conditions of the policy and also of the route permit of the vehicle, insurance company was not liable to indemnify the owner who was directed by the learned MACT to pay compensation to the claimant-respondents. Learned counsel submitted that it was the owner and driver who could be held responsible to pay ascertained

compensation to the claimants. This was only issue raised by the learned counsel for appellant in support of the appeals. Learned counsel to bring home this point placed reliance upon the judgments of the Hon'ble Supreme Court in cases titled *National Insurance Co. Ltd. (Appellant) v. Kaushalaya Devi and ors. (Respondents)*, reported in 2008 (4) Supreme 441; *National Insurance Co. Ltd. v. Parvathneni*, reported in [2009 (82) AIC 158 (S.C.)]; *National Insurance Co. (Appellant) Ltd. v. Baljit Kaur and ors. (Respondents)*, reported in 2004 ACJ 428 and *New India Assurance Co. Ltd. (Appellant) v. Asha Rani and ors. (Respondents)*, reported in 2003 ACJ 1.

In the aforementioned judgments, Hon'ble Supreme Court has held that if a person is traveling in goods vehicle, otherwise than permitted by contract/route permit/statute, in such eventuality, if the said person dies or sustaines injuries on account of vehicle meeting with an accident, insurance company will not be liable to indemnify the owner and it will be owner alone who will be responsible to compensate the claimants.

Learned counsel appearing for appellant-company also submitted that certified copy of the insurance policy which has been placed on record would not require any further proof by leading secondary evidence as has been held by this Court in case title *Kewal Krishan and ors., Appellants v. Smt. Krishan Devi and ors, Respondents* reported in AIR 2000 Jammu and Kashmir 89. Learned counsel also submitted that failure to plead in the written objections that the vehicle was a goods vehicle thus not making the insurance company liable to indemnify the owner cannot become a ground to direct the insurance company to indemnify the owner to pay compensation to the claimants. Learned counsel in this behalf referred to and relied upon judgment in case titled *New India Assurance Co., Appellant v. Hurmat begum and ors., Respondents* reported in AIR 1994 Jammu and Kashmir 1. Learned counsel, accordingly, submitted that appeals deserve to be allowed and award to the extent it directs the appellant to indemnify the owner and pay the compensation amount requires to be set aside.

Learned counsel for respondents submitted that new case has been set up by the appellant in the appeal, When as a matter of fact before the learned Tribunal appellant has accepted that the vehicle in which the deceased and injured were traveling and which met with an accident because of negligent driving of the driver and resulted in death/injuries of some of the persons who were traveling in it was a passenger vehicle, learned counsel submitted that in law appellant cannot set up a new case in an appeal. Learned counsel also submitted that on the basis of pleadings of the parties issues were framed by the learned MACT. The claimants have successfully proved the issues burden of which was placed on them whereas the appellant has not lead any evidence before the learned MACT and has thus failed to discharge its burden of proving issues. Learned counsel submitted that in the facts and circumstances of this case, impugned awards are just and legal and do not call for any interference. Learned counsel in support of their contention referred to and relied upon cases titled Shipping Corporation of India Ltd. v. Machado Brothers,

reported in AIR 2004 SC 2093; New India Assurance Company, Appellant v. Satpal Singh and ors. Respondent, reported in AIR 2000 Supreme Court 235 and Ramesh Kumar, Appellant v. National Insurance Co. Ltd., Respondent, reported in 2001 Supreme Court.

Satpal Singh's case has been held to be not correctly decided in Asha Rani's case. The law laid down by Hon'ble Supreme Court is that in the event a gratuitous passenger of a goods vehicle dies in the accident, the insurance company will not be liable to indemnify the owner of the vehicle and pay the compensation amount to the claimant.

Appellant-insurance company in its written statement/objections filed before the learned MACT has taken a specific factual stand that vehicle was passenger vehicle but driver had overloaded the vehicle. Appellant-insurance company has taken a complete u-turn and set up a different case in the appeal. A different case on facts set up at the appellate stage cannot be taken cognizance of by the appellate Court. The law of pleadings will not

allow a party to take a different stand on facts at one stage of proceedings and another stand at another stage of proceedings which would include the appellate stage. If a party has to take a stand different than the one which has taken in the pleadings, then it has to lay motion for seeking amendment of the pleadings and the Court/Tribunal has to consider whether such application can be allowed. Without seeking amendment of the pleadings even at appellate stage, the stand taken by the appellant cannot be taken cognizance of as that will be against the settled principles and norms of law. In like circumstances the legal stand taken at appellate stage contrary to the factual stand taken at the trial stage has not been entertained by the Hon'ble Supreme Court in case titled *Chimajirao Kanhojirao Shirke and another, Appellants v. Oriental Fire and General Insurance Co. Ltd., Respondent*. reported in AIR 2000 Supreme Court 2532. Paragraphs 8, 9 and 10 of the aforementioned judgment is taken note of:

"8. In the written statement filed by the insurance company, relevant portion of which

we have already quoted above, the stand taken therein is that it is due to oversight/mistake that the wording 'unlimited personal injury' is typed against the additional premium of Rs. 134/-.

9. This stand is contrary to the submissions made by the learned counsel for the respondent. It has not been the case of the insurance company that notwithstanding the word used therein, namely, 'unlimited personal injury' it would in terms of the policy would be limited to the liability of a third party. On the contrary, faced with the submission that such words would make the insurer liable even to the insured personally, the said plea and submission was made in the trial Court. Once the submission and the stand is that the writing is on account of oversight and mistake, the aforesaid submission made before us cannot be sustained.
10. In view of the aforesaid conclusion, we have no hesitation to hold that the High Court committed an error in setting aside the finding given by the trial Court, specially in view of the said specific plea taken in the written statement. The High Court felt that since it is a legal matter it could be adjudicated notwithstanding a different stand in its pleading. This approach was not proper. Once a stand in fact is taken that fact could not be controverted by any legal proposition. In the present case, the insurance company has not led any evidence to dissolve the stand taken in the written statement that it was done by mistake nor there was any application to amend such pleadings. In view of this, the High Court was not correct to decide the issue through legal inferences de hors of and without adverting to the glaring facts on the record. Accordingly, we set aside the judgment of the High Court and confirm that of the trial Court. The present appeal is accordingly allowed cost on the parties."

In view of the law laid down by Hon'ble Supreme Court in aforementioned case appellant-insurance company cannot be permitted to take a different stand in law which would be contrary to the stand taken in the pleadings on facts before the learned MACT. The appeals, for the above stated reasons, merit dismissal.

There is yet another reason for dismissing these appeals. Appellant-insurance company has satisfied the award passed under Section 140 of Act of 1988. The appellant- company has thus admitted that in the event the owner is held liable to pay compensation, they will be duty bound to indemnify the owner and it will be their responsibility to pay the compensation to the claimants/respondents. The appellant-company because of its aforestated conduct is estopped from challenging awards of the learned MACT, which are impugned in these appeals, solely on a legal ground which do not synchronize with the factual stand taken before the learned Tribunal.

The Hurmat Begam's case has proceeded on its own facts. In that case there was omission on behalf of insurance company to plead a fact, but in this case facts have been specifically pleaded and a definite stand taken, the judgment in Hurmat Begum's case is of no assistance to appellant.

For the above stated reasons, these appeals, being meritless, are dismissed.

Jammu
27.07.2011
"Paramjeet"

(Muzaffar Hussain Attar)
Judge