

THE HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

MAC APP No. 105 of 2004

The Branch Manager,
New India Assurance Company Limited,
Agartala Branch, Hari Ganga Basak Road,
Agartala, West Tripura.

..... Appellant

– Versus –

1. **Smt. Ratna Goswami (Bhattacharjee),**
W/o Sri Biswajit Bhattacharjee,
Village - Ishanpur, 60 Card Colony,
P.O.- Panchabati, P.S.- Sidhai,
District- West Tripura.
2. **Shri Santosh Saha,**
S/o Late Gopal Chandra Saha,
resident of Santipara,
P.S. East Agartala,
District - West Tripura.
3. **Smt. Rekha Chowdhury**
W/o Sri Tapan Chowdhury
4. **Sri Tamal Chowdhury**
S/o Sri Tapan Chowdhury
Both are resident of Radhanagar,
behind M.L.A. Hostel, Agartala, West Tripura

..... Respondents.

B E F O R E
THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA

For the appellant : Mr. P.K. Dhar, Advocate,
Mr. A Gon choudhury, Advocate.

For the respondents : Mr. P. Roy Barman, Advocate.

Date of hearing and : 27.06.2013.
delivery of judgment.

Whether fit for reporting: YES / NO

JUDGMENT & ORDER (ORAL)

This appeal by the insurance company is directed against the award, dated 19th April, 2004, passed by the learned Motor Accident Claim Tribunal in case No.T.S.(MAC)93 of 1995, whereby he held the insurance company liable to pay the compensation.

2. It is urged by Mr. P. K. Dhar, learned counsel appearing on behalf of the insurance company that since the deceased was a gratuitous passenger in a goods vehicle, the insurance company could not have been held liable. Here it would be pertinent to mention that the learned Tribunal agreed with the insurance company that the deceased was a gratuitous passenger. It also came to the conclusion that normally, under an 'Act policy', the insurance company is not liable to cover the liability in respect of a gratuitous passenger, but held as follows :

“On perusal of the W/S submitted by the Insurance Company, it appears that amongst other ground of objection it has taken the ground of objection to the fact that the vehicle was used violating the condition of policy by carrying passengers. It is, therefore, apparent from the W/S that this was not the sole ground of defence of the insurer. Statement made in para-5 to W/S that there was violation of condition of Insurance Policy is not a piece of evidence but a mere assertion. Under the Indian Evidence Act where a party who wishes the court to believe the fact, the burden of proof of such fact lies upon him. In the instant case, it is to be seen as to whether the Insurer has discharged its statutory obligation of establishing the fact that there was a breach of the condition of the Insurance policy and shifts its liability to the owner to pay compensation. But unfortunately the insurer did not examine any witnesses nor adduce any evidence

or even the condition of the policy has not been established in evidence to satisfy the court that there was actually violation of the condition. The Hon'ble Supreme Court has been pleased to decide (report in AIR 1988 SC 719) that if the Insurer takes a plea of violation of the condition, it must produce the policy and prove the contents'

3. The Tribunal proceeded on the basis as if the policy had not been produced or exhibited. I am constrained to observe that this finding of the Tribunal is totally erroneous and against the record. On perusal of the paper book of the Trial Court record, I find that the Administrative Officer of the insurance company appeared as OPW 1 and produced the policy which was exhibited as Exhibit A. He also clearly stated that the policy in question did not cover any risk for the passenger in the vehicle. There is virtually no cross examination to him on this aspect of the value.

4. The issue whether the Insurance Company is liable in respect of gratuitous passengers being carried in a goods vehicle has been subject matter of a number of decisions. In *National Insurance Co. Ltd. V. Bommithi Subbhayamma, 2005 ACJ 721(SC)*, the Apex Court held as under :-

"It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect persons other than the owner of the goods or his authorized representatives remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous

passengers who were neither contemplated at the time the contract of insurance was entered into nor any premium was paid to the extent of the benefit of the insurance to such category of people."

5. In *New India Assurance Co. Ltd. V. Vedwati*, (2007)9 SCC 486, the Supreme Court further held as under :

"13. The difference in the language of "goods vehicle" as appear in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in definition of "good vehicle" in the old Act. The position becomes further clear because the expression used is "good carriage" is solely for the carriage of goods. Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to Clause (ii) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short 'WC Act"). There is no reference to any passenger in "goods carriage".

14. The inevitable conclusion, therefore, is that the provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger traveling in a goods carriage and the insurer would have no liability therefore.

15. Our view gets support from a recent decision of a three-Judge Bench of this court in New India Assurance Co. Ltd. –Vs- Asha Rani, 2003 ACJ 1 (SC), in which it has been held that Satpal Singh's case, 2000 ACJ 1(SC), was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

6. In *National Insurance Co. Ltd. vs. Prema Devi*, 2008 ACJ 1149(SC), the Apex Court reiterated the above view.

7. In *National Insurance Co. Ltd. vs. Kaushalaya Devi*, 2008 ACJ 2144 (SC), the question before the Supreme Court was whether the insurance company can be held liable in respect of death of gratuitous passenger in a public goods vehicle. After discussing the entire law on the subject, the Supreme Court held that insurance company could not be held liable.

8. Recently the *High Court of H.P. in Jagdish Chand vs Bachan Singh*, 2010 ACJ 1229(Full Bench) held as under:

“38. In fact, till the amendment of Section 147 of the Act was carried out by the Amendment Act, 54, of 1994 w.e.f. 14.11.1994, the Apex Court had held that even the risk to the owner of the goods or his authorized representative was not covered. They were not treated as third parties. If all these authorities of the Apex Court were taken into consideration, it is obvious that gratuitous passengers, unauthorized passengers, even employees not covered under the Workmen’s Compensation Act and pillion riders who were all traveling in a vehicle have not been considered to be third parties. It is, therefore, obvious that the Apex Court has not upheld the view expressed by certain courts including the view expressed by a learned single judge in Noor Dass case, 2006 ACJ 142 (HP) that other than the insurer and insured, all other persons are third parties. Therefore, this plea of the claimants cannot be accepted. It is, therefore, obvious that the words ‘third party’ cannot include such persons.”

9. In view of the above authoritative pronouncements of the Supreme Court, gratuitous passenger cannot seek compensation from the insurance company and it is the owner/driver of the vehicle, who are liable to pay compensation.

10. In view of the aforesaid settled question of law, the insurance company could not be held liable to pay the compensation. The appeal is thus allowed to the extent that the insurance company is held not liable to satisfy the award. The owner and driver are liable to satisfy the award. The amount, if any, already paid by the insurance company will not be recovered from the claimant-respondent but it may initiate proceedings to recover them from the owner of the vehicle. It is made clear that no separate suit is required to be filed in this behalf and any recovery or execution can be made by filing appropriate application before the learned Motor Accident Claims Tribunal.

11. The appeal is thus disposed of in the aforesaid terms.

Send down the LCRs forthwith

CHIEF JUSTICE