

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No.255 of 2011 a/w FAO Nos.256, 257, 258, 259, 260, 261, 262, 263 264 & 265 of 2011, 446, 447 of 2011, 273 & 288 of 2007

Reserved on : 21.11.2014.

Pronounced on: **November 28 , 2014.**

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1. FAO No.255 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Kushal Kumar and others.		...Respondents.
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2. FAO No.256 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Master Goldi Kumar and another.		...Respondents.
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3. FAO No.257 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Anjana Kumari and another.		...Respondents.
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4. FAO No.258 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Kamla Devi and another.		...Respondents.
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5. FAO No.259 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Satish Chand and another.		...Respondents.
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6. FAO No.260 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Narender Kumar and another.		...Respondents.
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7. FAO No.261 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Madan Lal and others.		...Respondents.
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8. FAO No.262 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Sunita Devi and others.		...Respondents.
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9. FAO No.263 of 2011.		
Oriental Insurance Company Ltd.		...Appellant.
VERSUS		
Sunita Kumari and another.		...Respondents.
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10. FAO No.264 of 2011.

Oriental Insurance Company Ltd. ...Appellant.

VERSUS

Chandresh Kumari and another. ...Respondents.

11. FAO No.265 of 2011.

Oriental Insurance Company Ltd. ...Appellant.

VERSUS

Gayatri Devi and others. ...Respondents.

12. FAO No.446 of 2011.

Satish Chand. ...Appellant.

VERSUS

Indira Rana and another. ...Respondents.

13. FAO No.447 of 2011.

Nrender Kumar. ...Appellant.

VERSUS

Indira Rana and another. ...Respondents.

14. FAO No.273 of 2007.

Sona Devi and others. ...Appellants.

VERSUS

Indira Rana and another. ...Respondents.

15. FAO No.288 of 2007.

Indira Rana. ...Appellant.

VERSUS

Sona Devi and others. ...Respondents.

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The Hon'ble Mr.Justice Mansoor Ahmad Mir, Chief Justice.

Whether approved for reporting? Yes.

For the appellant :

Mr. Ashwani K. Sharma, Advocate for the appellants in FAOs No. 255 to 261 of 2011 and for respondent No. 2 in FAO No. 273 of 2007 and FAOs No. 446, 447 of 2011.

For the respondents:

Mr. K.S. Banyal, Advocate, for respondents No. 1 to 3 in FAO No. 255 of 2011, for respondent No. 1 in FAO No. 256 of 2011.

Mr. Raman Sethi, Advocate, for respondent(s) No. 1 in FAO No. 257, 258, 259 & 260 of 2011.

Mr. Sandeep Chauhan, Advocate vice Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 4 in FAO No. 261 of 2011.

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Mr. Raman Sethi, Advocate, for the appellants in FAO No. 446 of 2011.

Mr. Ajay Chandel, Advocate, for the appellant in FAO No. 288 of 2007 and for respondent No. 1 in FAO No. 273 of 2007.

Mr. Romesh Verma, Advocate, for the appellant in FAO No. 273 of 2007 and for respondents No. 1 to 4 in FAO No. 288 of 2007.

Mr. G.D. Sharma, Advocate, for respondent No. 5 in FAO No. 288 of 2007.

Mr. Surender Saklani, Advocate, for respondent No. 1 in FAO No. 446, 447 of 2011, for respondent No. 2 in FAOs No. 256, 257, 258, 259, 260, 263, 264 of 2011, for respondent No. 4 in FAO No. 265 of 2011, FOR respondent No. 4 in FAO No. 255 of 2011, for respondent No. 5 in FAO No. 262 of 2011 and for respondent No. 7 in FAO No 261 of 2011.

Nemo for respondent No. 5 in FAO No. 261 of 2011 and for respondents No. 1 to 4 in FAO No. 262 of 2011

Mansoor Ahmad Mir, Chief Justice:

Vehicular accident, dated 19th March, 2005, in which bus bearing registration No.HP-56-2606 was involved, gave birth to a batch of Claim Petitions, came to be determined by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, (hereinafter referred to as the Tribunal), by different awards. The Tribunal determined compensation in each claim petition. In one claim petition, subject matter of FAO No.288 of 2007, the owner was saddled with the liability and in rest of the claim petitions, impugned in FAO Nos.255, 256, 257, 258, 259, 260, 261,

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262, 263, 264 and 265 of 2011, the insurer came to be saddled with the liability.

2. Claimants (appellants in FAO Nos.446 of 2011, 447 of 2011 and 273 of 2007) have questioned the impugned awards on the ground of adequacy of compensation.

3. Thus, I deem it proper to determine all these appeals by this judgment.

Brief facts:

4. The claimants, being the victims of vehicular accident caused by the driver, namely, Piar Chand, while driving the bus bearing registration No.HP-56-2606, preferred claim petitions for grant of compensation, on the ground that on 19.3.2005 at about 9.15 a.m., the driver of the offending bus, while driving the same rashly and negligently, could not control it and the bus rolled down the road, resulting into the death of some of the passengers, including the driver, while some of the passengers sustained injuries. Thus, the claimants filed Claim Petitions for grant of compensation, as per the details and break-ups given in the respective petitions.

5. Respondent No.1 (owner of the offending bus) and Respondent No.2 (insurer) resisted the Claim Petitions by filing separate replies.

6. On the pleadings of parties, issues were settled by the Tribunal in all the Claim Petitions.

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7. The claimants and the respondents have led evidence. The Tribunal, after scanning the evidence, allowed the claim petitions and saddled the insurer with the liability vide awards impugned in FAO Nos. FAO Nos.255, 256, 257, 258, 259, 260, 261, 262, 263, 264 and 265 of 2011. However, in the award impugned in FAO No.288 of 2007, the insurer has been exonerated and the liability was fastened upon the owner.

8. FAO No.255 of 2011, alongwith connected FAO Nos.256 to 265 of 2011, came up for consideration before this Court on 13th November, 2013, and with the consent of parties, the following additional issue was framed:

“Whether the driver of the offending bus deceased Piar Chand was not holding a valid and effective driving license to drive the offending vehicle on the day of accident? OP-Insurance Company”

9. The parties were asked to lead further evidence with a command to the Presiding Judge of the Tribunal to return findings on the said issue. The Tribunal failed to return findings till 1st March, 2014 and this Court, vide order dated 1st March, 2014, withdrew the claim petitions from the Motor Accident Claims Tribunal-II, Kangra at Dharamshala and transferred the same to Motor Accident Claim Tribunal-I, Kangra at Dharamshala, (for short, MACT-I), who was asked to return findings within two months.

10. The issue came to be determined by the MACT-I, vide order dated 29th April, 2014, by holding that the insurer

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failed to prove that the driver of the offending vehicle was not having a valid and effective driving licence.

11. In appeals filed by the insurer and the insured, i.e. FAO Nos.255, 256, 257, 258, 259, 260, 261, 262, 263, 264 and 265 of 2011 and FAO No.288 of 2007, the moot question is - Whether the insurer is to be saddled with the liability?

12. In three appeals (FAO Nos.446 & 447 of 2011, and 273 of 2007), filed by the claimants, the question is – Whether the compensation awarded in favour of the claimants is inadequate.

13. The Tribunal in the awards impugned in FAO Nos.255, 256, 257, 258, 259, 260, 261, 262, 263, 264 and 265 of 2011 held that the driver was having the valid and effective driving license. The Tribunal, after examining the entire evidence, made discussions in paragraph 10 of the award, dated 31st March, 2011, impugned in FAO No.255 of 2011, and held that the driver was having the license, which was renewed by the Licensing Authority, Baijnath, after verification. It is apt to reproduce paragraph 10 of the impugned award hereunder:

“10. From the above oral as well as documentary evidence brought on record, it becomes clear that Piar Chand was admittedly the driver of the bus in question which met with the accident. The driver was also having the driving license, the copy of which is Ext. RW1/B. The owner claims that it was valid driving license and insurance company has claimed that it was fake license. The owner is only required to prove that the driver was having license and in case the insurer claims that it was fake license, then the burden of proof is on the Insurance Company to prove so. The evidence coming on record shows that the license of the

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driver Piar Chand was renewed from Baijnath. The fact that Licensing Authority Baijnath had in its communication Ext. RW2/B sought information regarding Piar Chand Changa son of R. Changa shows that the driver might also be known as Piar Chand son of R. Changa and his driving license was specifically mentioned in the communication in response to the same, the Licensing Authority Siliguri has returned it as per Ext. RW2/A by saying that the license was so issued but his father's name has been mentioned as B. Changa instead of R. Changa. It appears that it may be a clerical mistake that R.Changa was mentioned as B. Changa. But the fact remains that Driving License No. WB4403 B 208 had actually been issued by Licensing Authority West Bengal and the driver was driving the vehicle on this license. On the Renewal by the Licensing Authority Baijnath simply because there was different spelling in the name of Piar Chand and his father name Rijhu Ram was mentioned as R. Changa or Changa was added in his name, will not prove that the driving license was fake. The driving license would have been fake had it been not issued by the Licensing Authority Siliguri. Therefore, the initial burden which is on the owner or driver has been discharged by showing that the driver name was Piar Chand Changa and the onus is on the Insurance Company to prove that it was a fake license. It has come that it was an old license issued in 1980 in Punjab and was renewed from time to time. It was issued from Punjab initially and thereafter renewed. The licensing Authority where the license is prepared or renewed, has the photograph of the person in whose name the license is. Nothing prevented the Insurance Company from proving by bringing evidence from Punjab or West Bengal with the photograph, to show that no such license was prepared by the Licensing Authority in Punjab or West Bengal."

14. The Presiding Judge, MACT-I, has also examined witnesses and appreciated the entire evidence afresh and came to the conclusion that the driver was having a valid and effective driving license. It is apt to reproduce paragraph 9 of the order, dated 29th April, 2014, passed by MACT-I, hereunder:

"9. The entire evidence adduced by the parties in support of the issue has been appraised. The bare perusal of the statement of RW-3 Baldev Raj, licensing clerk in the office of Licensing Authority, Baijnath and of Paritosh Roy upper Division Assistant

in the office of Registering Authority Siliguri, recorded by local commissioner Sh.Nilay Chakraborty Advocate on interrogatories revealed that Sh.Piar Chand was duly licensed to drive the bus. Driving license No.WB/4403/B/208 had been issued on 4.5.1993 in favour of Phyara Chand Chango. The driving license No.1881/80/G dated 13.12.1980 issued by Licensing Authority Punjab had been produced before the Licensing Authority Siliguri. The D.L. No.1881/80/G dated 13.12.1980 had not been produced. The said licence could have been the best evidence to establish whether the licence was genuine or not. The non production of licence would establish that licence issued by Licensing Authority Siliguri in favour of Phyara Chand was genuine. Phyara Chand had not been any other person except Piar Chand. Sh.Piar Chand had applied to the Licensing Authority Baijnath for renewal of the licence. The Licensing Authority Baijnath had sent a request to Registering Authority Siliguri to send no objection certificate. The Licensing Authority, Baijnath renewed the licence. The presumption would be that it was done after receipt of no objection certificate. Sh.Piar Chand was son of Rijhu Ram whereas in the records of Registering Authority Siliguri his name is mentioned as Phyara Chand Chango son of B. Chango. The slip occurring in the spellings appear to be due to a clerical mistake. Piar Chand would not have submitted to the authorities that he had no such driving licence at Siliguri without being specific. His knowledge had been categorical that he had driving licence at Siliguri. The driving licence of Piar Chand had been genuine."

15. Keeping in view the findings returned by the Tribunal, read with the findings returned by MACT-I vide order dated 29th April, 2014, in terms of order passed by this Court, dated 13th November, 2013 read with the order dated 1st March, 2014, the only conclusion which can be drawn is that the driver was having valid and effective driving licence and the owner has

not committed any willful breach of the terms and conditions of the insurance policy.

16. It was for the insurer to plead and prove that the owner has committed any willful breach in which it has failed.

17. The Apex Court in the case of **National Insurance Co. Ltd. versus Swaran Singh & others**, reported in **AIR 2004 Supreme Court 1531**, has held that for avoiding liability, the insurer has to prove the breach committed by the insured. It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

“105.

(i)

(ii)

(iii) *The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*

(iv) *The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*

(v).....

(vi) *Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply “the rule of main purpose” and the*

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concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

18. It is also profitable to reproduce paragraph 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company**, reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

19. Applying the above test to the present appeals, the findings returned by the Tribunal in impugned awards, subject matter of FAO Nos.255, 256, 257, 258, 259, 260, 261, 262, 263, 264 and 265 of 2011, read with the findings returned by the MACT-I, it is held that the insurer was rightly saddled with the liability.

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20. The Tribunal has fallen in error in saddling the owner with the liability in FAO No.288 of 2007. Accordingly, the said findings are set aside and the insurer is saddled with the liability in view of the above.

21. Now coming to the appeals filed by the claimants i.e. FAO Nos.446 & 447 of 2011, and 273 of 2007, I have gone through the impugned awards. The Tribunal has awarded Rs.2,27,000/-, Rs.2,21,600/- and Rs.99,500/-, respectively, after making discussion in paragraphs 20 and 21, paragraphs 21 and 22 and paragraphs 14 and 15, of the respective awards impugned in FAO Nos.446 & 447 of 2011, and 273 of 2007. The Tribunal has awarded compensation in favour of the claimants after perusing the entire record, is correct, needs no interference. No ground for enhancement of the compensation amount is made out. Accordingly, it is held that the amount awarded by the Tribunal in these cases is adequate.

22. However, the Tribunal vide award impugned in FAO No.273 of 2007 has awarded interest at the rate of 6% per annum, which, in my view is on the lower side. Therefore, the award impugned in FAO No.273 of 2007 is modified to the extent that the claimants are held entitled to interest at the rate of 7.5% per annum.

23. The appellant/claimant has moved CMP No.918 of 2011 in FAO No.446 of 2011 under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure (for short, CPC), on

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the ground that the age of the claimant has wrongly been taken by the Tribunal as 60 years, while the age of the claimant was 44 years at the time of accident. The application is afterthought for the reason that the claimant while appearing in the witness box has admitted his age as 60 years. Therefore, the application is dismissed, being misconceived.

24. The insurer has moved CMP No.751 of 2011, wherein it is stated that the insurer has deposited Rs.10,636/- in excess. The Registry is directed to calculate the amount, and in case the amount is deposited in excess, the excess amount, with up-to-date interest, be released in favour of the applicant/insurer through payee's account cheque.

25. Having said so, the appeals filed by the insurer and the claimants i.e. FAO Nos.255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 446 and 447 of 2011 are dismissed. The award in FAO No.273 of 2007 is modified and the appeal filed by the owner i.e. FAO No.288 of 2007 is allowed, as indicated above.

26. All the appeals stand disposed of accordingly, alongwith the pending CMPs, if any. The Registry is directed to release the award amount strictly in terms of the impugned awards. A copy of this judgment be also placed on the record of each file.

November 28, 2014.

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**(Mansoor Ahmad Mir),
Chief Justice.**