**HIGH COURT OF JAMMU AND KASHMIR**
**AT JAMMU**

CIMA No. 262/2006, MP No. 01/2015
c/w
Cross Appeal (c) No. 35/2011
CIM No. 221/2006
CIMA No. 322/2006, MP No. 449/2006
CIMA No. 198/2006
CIMA No. 199/2006
CIMA No. 232/2006, MP No. 271/2006
CIMA No. 222/2006, MP No. 259/2006
CIMA No. 220/2006
CIMA No. 233/2006, MP No. 272/2006
CIMA No. 234/2006
CIMA No. 240/2006
CIMA No. 44/2007, MP No. 62/2007
CIMA No. 106/2009, MP No. 144/2009
CIMA No. 219/2006
CIMA No. 209/2009
CIMA No. 242/2006, MP No. 282/2006
CIMA No. 208/2008, MP No. 290/2008

Date of decision:18.11.2015

Oriental Insurance Company Ltd. vs. Shiv Devi & ors.
and connected matters

**Coram:**

**Hon'ble Mr. Justice Janak Raj Kotwal, Judge.**

**Appearing counsel:**

For appellant (s): Mr. D.S.Chauhan, Advocate.

For respondent(s): Mr. M.P.Gupta, Advocate.
Mr. A.K.Basotra, Advocate.

i. Whether approved for reporting in Press/Media : Yes/No/Optional
ii. Whether to be reported in Digest/Journal : Yes

1. Seventeen appeals have been filed by the Insurance Company from equal number of judgment and awards passed by the learned Motor Accidents Claims Tribunal,

Doda (for short, the Tribunal). One [(c) No. 35/2011], however, is a cross-appeal in CIMA No. 262/2006.

2. Heard. I have perused the record.

3. Seventeen Claim applications were filed either by legal representatives of the persons, who died, or by the persons, who suffered injuries, in a road traffic accident that occurred on 30.11.2002. Vehicle involved in the accident was a passenger vehicle (matador) bearing registration No. JK06-602. Learned Tribunal after inquiry in each claim application found that the accident occurred due to rash and negligent driving of the driver of the offending vehicle. Learned Tribunal assessed the compensation payable to the claimants and foisted liability of paying the compensation on the appellant with whom the offending vehicle as at the relevant time was insured for third party risk.

4. Appellant's grievance mainly relates to foisting of the liability of paying compensation on it in all the claims on the ground that as at the time of the accident the offending vehicle was being driven in violation of the conditions of its route-permit and the insurance policy inasmuch as the vehicle was overloaded. It is contended that the permitted sitting capacity of the offending vehicle was 22 + 2 and the sitting capacity was similarly reflected in the insurance policy but the route-permit as

well as the insurance policy were violated as the vehicle was overloaded.

5. The appellant-insurer, it appears, had objected its liability to indemnify the owner/insured before the learned Tribunal on the grounds similar as taken in these appeals. I may refer, briefly, to the objections filed on behalf of the appellant-insurance company in Claim No. 42, judgment and award wherein has been appealed from in CIMA No. 262/2006. It was contended that the vehicle was being driven in breach of the insurance policy, as the driver did not possess a valid driving license. It was contended also that the permitted sitting capacity of the vehicle was 24 persons including driver and conductor but "the vehicle was overloaded as much as the roof of the vehicle was full with passengers" and therefore, there was breach of the insurance policy as well as the route permit. The defence taken by the insurer seems to have been formulated in identical issues framed by the learned Tribunal in all the claim applications and I cull out such issues framed in Claim No. 42 (supra).

> "4. Whether the respondent No.1 is not liable to indemnify the petitioners for the death of Tulsi Ram as the driver of the offending vehicle did not hold a valid driving license? OPR-1.
>
> 5. Whether respondent No.1 is not liable to pay the compensation to the

> petitioners on account of the fact that the offending vehicle was being driven in violation of the terms and conditions of the Insurance Policy?
>
> OPR-1."

6. The appellant-insurer, however, could not succeed in its defence before the learned Tribunal mainly for the reason that it did not lead any evidence in support of the defences taken by it. In some of the cases, however, the defence of overloading did not otherwise find favour of the learned Tribunal, even though overloading was not proved.

7. The common question, thus, raised for determination in these appeals is; whether the appellant-insurer, which undisputedly had issued certificate of insurance in favour of the owner of the offending vehicle, can be absolved of its liability to indemnify the insured on the ground that vehicle was overloaded at the time of accident without the overloading and the extent of overloading having been proved by the insurer.

8. While not disputing that the insurer did not lead any evidence before the Tribunal to prove that the offending vehicle was overloaded as at the time of accident, or, in particular, the extent of overloading, Mr. D. S. Chauhan, learned counsel for the appellant would say that overloading of the vehicle is evident in face of the number of claim applications, which had been filed in

respect of the accident in question, and no more evidence in this regard is required. Mr. Chauhan in order to make out a case of overloading produced two earlier judgments, both dated 31.05.2006, rendered by a co-ordinate Bench of this Court in two bunches of appeals with lead cases as CIMA No. 206/2005, Oriental Insurance Co. Ltd. v Guddi Devi and ors. (for short, hereinafter to be referred as Guddi Devi's case) and CIMA No. 102/2001, Oriental Insurance Co. Ltd. v Allahdin and ors. (for short, hereinafter to be referred as Allahdin's case). Mr. Chauhan argued that liability of the appellant, besides the driver and conductor of the vehicle, extends only up to 22 passengers who alone were covered under the certificate of insurance issued by the appellant and the appellant is not liable to satisfy the awards in respect of the passengers boarded over and above the sitting capacity of the vehicle. Mr. Chauhan placed reliance on **National Insurance Co. Ltd. v Anjana Shyam and ors., 2007 (5) Supreme 856.**

9. Per contra, Mr. M.P.Gupta, Advocate and Mr. A.K.Basotra, Advocate appearing for the claimants submitted that the appellant having failed to prove the breach of the route permit or the insurance policy cannot succeed on the basis of head count of the appeals in this bunch of appeals and those said to have been already disposed of. In any case, learned counsels

submitted, the appellant is bound to pay the compensation in all the claims and take recourse against the insured in view of the latest view taken by the Supreme Court in **United India Insurance Co. Ltd. v K.M.Poonam and ors., 2011 ACJ 917.**

10. It would be apt to take note of the course to be adopted in a case where benefit on account of overloading of the offending passenger vehicle in order to escape the liability to indemnify the insured is available to the insurer. In **Anjana Shyam's case** (supra), to meet with such a situation Their Lordships of the Supreme Court have held that "practical and proper course would be to hold that the Insurance Company, in such a case, would be bound to cover the higher of the various awards and will be compelled to deposit the higher of the amounts of compensation awarded to the extent of the number of passengers covered by the Insurance Policy." Their Lordships have further held that the Tribunal thereafter shall distribute the money so deposited by the Insurance Company appropriately to all the claimants and leave all the claimants to recover the balance from the owner of the vehicle.

11. Earlier, in **National Insurance Co. Ltd. v Baljit Kaur, 2004 ACJ 428,** a learned three -Judge Bench of the Supreme Court accorded consideration to a wider question relating to "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 was any premium paid to extend the benefit of insurance to such *category* of people". Their Lordships took the view that interest of justice would be subserved if the Insurance Company satisfies the award and recover the same from the owner of the vehicle and for the said purpose it would not be necessary for the Insurance Company to file a separate suit, but to initiate a proceeding before the executing court as if dispute between insurer and the owner was the subject-matter of the determination before the Tribunal which had decided in favour of the insurer and against the owner of the vehicle.

12. A question relating to overloading of the offending vehicle was directly raised before the Supreme Court in **K .M. Poonam's case (supra).** Their Lordships held that the liability of insurer to pay compensation was confined to number of persons covered by the insurance policy (six persons in that case) and not beyond the same and, having so held, their Lordships in order to meet the ends of justice applied the procedure adopted by learned three-Judge Bench in Baljit Kaur's case and directed that:

> "26…the Insurance Company should deposit the total amount of compensation awarded to all the claimants and the amounts so

> deposited be disbursed to the claimants in respect to their claims, with liberty to the insurance company to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the insurance policy from the owner of the vehicle, as was directed in Baljit Kaur's case (supra)."

13. In face of the view taken by the learned three-Judge Bench of the Supreme Court in **Baljit Kaur's case (supra)** followed in **K.M.Poonam's case (supra),** in a case where the factum of overloading is proved, the liability of the insurer would be confined to the number of persons covered by the insurance policy and not beyond the same. However, the insurer would be asked to satisfy all the awards with liberty to recover the amounts paid by it over and above the compensation amounts payable in respect of the persons covered by the insurance policy from the owner of the vehicle.

14. It is not denied that the appellant-insurer did not lead any evidence to prove the issues relating to the defences taken by it before the Tribunal. In the result, appellant did not prove before the Tribunal either that the driver of the offending vehicle did not possess a valid or effective driving license as at the time of accident or that the vehicle was overloaded as compared to its permitted sitting capacity as also the sitting capacity of the offending vehicle and the extent of overloading. Inasmuch as, even he insurance policy

was not proved by the appellant as it did not lead any evidence before the Tribunal.

15. The judgment dated 31.05.2006 rendered by the co-ordinate Bench of this Court in Guddi Devi's case would show that the eight appeals therein related to the awards passed by the same Tribunal, that is, MACT, Doda in equal number of claim applications arising out of a road traffic accident involving Motor Vehicle No. JK06-602 (matador) having occurred on 30.11.2002. Argument of Mr. Chauhan is that there is a reasonable ground to infer that these eight claim applications and the claim applications involved in the seventeen appeals on hand relate to the same accident. Learned co-ordinate Bench in those appeals, however, noticed that the respondents therein (that includes the insurance company) did not lead evidence and therefore, evidence of claimants remained unrebutted. It was held that if a breach is alleged, it is for the insurer to plead and prove the breach and further that it is also to be proved that breach was the cause of accident. In holding so, reliance was placed on a Division Bench Judgment of this Court in **National Insurance Co. Ltd. v Abdul Gaffar Pandit, 2004 (II) SLJ, 692** and two judgements of the Supreme in **National Insurance Co. Ltd. v Swaran Singh and ors., AIR 2004 SC 1531** and **Poonam Devi and anr. v Divisional Manager, New India Assurance Co. Ltd. and**

**ors., AIR 2004 SC 1742.** It was thus held further that in order to avoid liability, the insurer was under legal obligation to prove that cause of accident was overloading and that there was no evidence which could be made the basis for holding that the owner had committed breach and that breach was the cause of accident. Learned Single Judge after according consideration to other aspects of the case and eventually dismissed all the appeals.

16. The judgment dated 31.05.2006 in Allahdin's case would show that four out of the bunch of a large number of appeals disposed of by the said judgment related to the accident involving a Motor Vehicle bearing registration No. JK06-602 (matador). Date of accident, however, is not evident from the judgment. Argument of Mr. Chauhan is that these four claim applications also relate to the same accident. These appeals were dismissed by this Court in the same manner as in Guddi Devi's case.

17. Besides relying upon aforementioned two judgments of the co-ordinate Bench of this Court, Mr. Chauhan in his effort to make out that more than 22 passengers were sitting in the offending vehicle also sought to show that another bunch of six appeals of the similar nature have been disposed of by another co-ordinate Bench of this Court and one more appeal has been similarly disposed of by another Bench. In short, an effort was made by

learned counsel for the appellant to make out that, besides these seventeen appeals filed by the appellant, nineteen other appeals arising from nineteen awards relating to the same accident have already been disposed of by this Court taking the number of total claim applications to 35 and showing that at least 35 persons were sitting in the offending vehicle at the time of accident and that liability of the appellant extends only up to 24 persons.

18. The course sought to be adopted by the learned counsel for the appellant for proving the factum of overloading of the offending vehicle is unknown to law. It is well settled that after issuing the certificate of insurance the insurer in order to escape its liability to indemnify the insured has not only to plead a defence but has to prove by leading evidence the defence taken by it. Moreover, if a breach of a condition of insurance policy is pleaded by the insurer, the insurer has to prove also that the breach has been committed by the insured. In order to escape liability to indemnify the insured in respect of the claims of the passengers over and above the permitted sitting capacity of the offending vehicle the insurer has to prove primarily the sitting capacity of the vehicle, extent of overloading and also that the overloading had been the cause of the accident. The defence of overloading, if any, must be pleaded and proved by leading evidence before the Tribunal. Only

after proving these factual aspects, can be raised the all important question, whether the overloaded passengers can be excluded from the benefit of third part risk insurance granted by the insurer and course to be adopted can be devised in light of the case law on the subject. Clue to the importance of this question can be found in the observation of Their Lordships in K. M. Poonam's case that; 'since the insurance of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the large number of persons carried in the vehicle. Such excess number of the persons would have to be treated as third parties, but since no premium has been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as for as they are concerned' (para 24 of the reporting). Insurer in no eventuality, however, can be permitted to succeed on the basis of supposition or by counting at appeal stage the total number of claims filed in and disposed of by one or more than one Claims Tribunals at different times.

19. What is sought by the learned counsel for the appellant and to expect this Court to take a view in these appeals that the offending vehicle was overloaded not only is unknown to law but, if allowed, would be as good as

annulling the judgments rendered by the co-ordinate Bench in Guddi Devi's case and Allahdin's case, which have now attained finality. The appellant having chosen not to lead any evidence before the Tribunal and it not being disputed that liability of the appellant has attained finality in the awards passed in all other claim applications, the appellant cannot be expected to and held entitled to reopen the same question in these appeals.

20. For all that said and discussed above, these appeals are liable to fail for the reason that the appellant-insurer has not proved the breach of a condition of insurance policy or a condition of route permit of the vehicle, in particular the factum of overloading of the vehicle, in the claim applications before the learned Tribunal. **All the seventeen appeals filed by the Insurance Company are, therefore, dismissed as without any merit.**

**Cross Appeal (c) No. 35/2011** :

Heard and perused the record.

21. This cross-appeal relates to the claim for compensation in File No. 47/Claim filed by the legal representatives of deceased, Tulsi Ram, who died in aforementioned road traffic accident involving Vehicle No. JK06-602 (matador) that occurred on 30.11.2002. Learned Tribunal has awarded a compensation of Rs.13, 92,500/ with 7.5%

interest in favour of the appellants (claimants) under the following heads:

1. Loss of dependency : Rs. 13,80,000/-
2. Funeral expenses : Rs. 2,500/-
3. Love and affection : Rs. 5,000/-.
4. Loss of consortium : Rs. 5,000/-.

22. Argument of learned appellants' counsel, briefly and mainly, is that compensation under the head "loss of dependency" has not been calculated by the learned Tribunal in accordance with the law laid down by the Supreme Court in Sarla Verma's case. In particular it is contended in the appeal that learned Tribunal has taken the monthly income of the deceased as Rs.16,500/- instead of Rs. 17,774/- as his proved salary as at the time of the death of the deceased. Counter argument of Mr. D. S. Chauhan, learned counsel for the insurer, is that the learned Tribunal has calculated the compensation in accordance with the multiplier method prevailing as at the time of accident as well as the date of award and no reliance can be placed on Sarla Verma's case that came to be decided much after the date of award in the year 2009.

23. Question in regard to quantum of compensation was formulated in issue No.2 framed by the learned Tribunal. As per the salary certificate produced by the claimants, salary of the deceased was Rs.17, 643/ and

deceased was found paying Rs.1237/ per month as income tax. Learned Tribunal, therefore, cannot be said to have committed any error in taking monthly income of the deceased as Rs.16, 500/ as no other income was proved. Learned Tribunal was also right in computing the compensation by applying multiplier method as laid down by Supreme Court in **Tarlok Chand's case, 1996 ACJ, 831 SCC.** While applying the unit formula as contemplated under the multiplier method, the learned Tribunal cannot be said to have committed any error in taking the number of units as 11 and deducting the value of two units, that is, Rs.3000/- as share of the deceased and Rs. 2000/- per month as out of pocket expenses of the deceased and thereby having taken the annual loss of dependency of the claimants as Rs. 1,38,000/. Learned Tribunal, however, was not justified in scaling down the multiplier to 10 from prescribed multiplier of 15, having regard to the age of the deceased who was found to be 42 as at the time of accident. Scaling down of the multiplier should not have been more than three points and multiplier of 12 should have been applied. The award passed by the Tribunal, therefore, calls for indulgence to the extent of the application of multiplier and multiplier of 12 is applied. Compensation under the head loss of dependency, therefore, would be Rs.16, 56,000/ (1,38,000 x 12) instead of Rs.13,80,000/ as awarded by the Tribunal.

Formula as laid down under Sarla Verma's case (2009) 6 SCC 121, however, need not be referred to as the multiplier method was applicable at the time of the award by the Tribunal.

24. For the aforementioned, this **cross appeal is allowed by enhancing the compensation by Rs.2, 76,000.** The enhanced amount is proportionally apportioned in favour of the claimants having regard to the apportionment made by the learned Tribunal.

25. All the appeals stand disposed of accordingly. Award amounts, if deposited, in this Court shall be released in favour of the claimants as per the apportionment made by the learned Tribunal.

**(Janak Raj Kotwal)**
**Judge**

**Jammu:**
18.11.2015
Pawan Chopra