IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO No. 36 of 2012
a/w FAO No. 96 of 2012

Decided on: 30.09.2016

FAO No. 36 of 2012

Bajaj Allianz General Insurance Company Limited …Appellant.

Versus

Shri Phool Chand and others …Respondents.

…….

FAO No. 96 of 2012

Shri Phool Chand …Appellant.

Versus

Smt. Veena Devi and others …Respondents.

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

Whether approved for reporting? Yes.

FAO No. 36 of 2012

For the appellant: Mr. Aman Sood, Advocate.

For the respondents: Mr. Vinay Thakur, Advocate, for respondent No. 1.

Mr. V.S. Chauhan, Advocate, for respondents No. 2 and 3.

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FAO No. 96 of 2012

For the appellant: Mr. Mr. Vinay Thakur, Advocate.

For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 and 2.

Mr. Aman Sood, Advocate, for respondent No. 3.

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

Both these appeals are outcome of a common award, thus, I deem it proper to determine both these appeals by this common judgment.

2. Challenge in both these appeals is to award, dated 2nd November, 2011, made by the Motor Accident Claims Tribunal, Shimla, H.P. (for short "the Tribunal") in M.A.C. Petition No. 52-S/2 of 2009, titled as Sh. Phool Chand versus Smt. Veena Devi and others, whereby compensation to the tune of ₹ 75,000/- with interest @ 8% per annum from the date of the claim petition till its realization alongwith costs assessed at ₹ 5,000/- came to be awarded in favour of the

claimant-injured and against the insurer (for short "the impugned award").

3. The owner-insured and driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

4. The insurer has questioned the impugned award by the medium of FAO No. 36 of 2012 on the ground that the Tribunal has fallen in an error in saddling it with liability and exonerating the owner-insured of the offending vehicle for the reason that the owner-insured has not obtained the route permit of the offending vehicle at the relevant point of time.

5. The claimant-injured has also called in question the impugned award by the medium of FAO No. 96 of 2012 on the ground of adequacy of compensation.

6. The dispute involved in both these appeals revolves around issues No. 2 and 7, which read as under:

> *"(ii) If issue No. (i) is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *(vii) Whether the vehicle in question was being driven in contravention of the terms*

and conditions of the insurance policy? OPR-3"

7. It was for the insurer to plead and prove that the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy and the owner-insured has committed willful breach, has not led any evidence, thus, has failed to discharge the onus.

8. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. .....

(i) .....

(ii) .....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (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 concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

9. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** has laid down

the same principle. It is profitable to reproduce para 10 of the judgment herein:

> *"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's case (supra). 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."*

10. The Apex Court in the case titled as **Fahim Ahmad & Ors. versus United India Insurance Co. Ltd. & Ors.,** reported in **2014 AIR SCW 2045,** held that the insurer has not only to plead the breach but has also to substantiate the same by adducing positive evidence. It is apt to reproduce para 6 of the judgment herein:

> *"6. Although the plea of breach of the conditions of policy was raised before the Tribunal, yet neither any issue was framed nor any evidence led to prove the same. In our opinion, it was mandatory for respondent No. 1-Insurance Company not only to plead the said breach, but also substantiate the same by adducing positive evidence in respect of the same. In the absence of any such evidence, it cannot be presumed that there was breach of the conditions of policy. Thus, there was no reason to fasten the said liability of payment of the amount of compensation awarded by the Tribunal on the appellants herein."*

11. Having said so, the Tribunal has rightly determined issue No. 7 against the insurer and is accordingly upheld.

12. I have gone through the assessment made by the Tribunal and am of the considered view that the Tribunal has rightly made the assessment, cannot be said to be meagre. Accordingly, the amount awarded is held to be just and is upheld.

13. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed.

14. Registry to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

15. Send down the record after placing copy of the judgment on Tribunal's file.

(Mansoor Ahmad Mir)
Chief Justice

September 30, 2016
(rajni)