IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

FAO (MVA) No. 107 of 2011
Date of decision: 29th July, 2016.

Oriental Insurance Co. Ltd. …..Appellant.

Versus

Smt. Gurmeet Rani and others …..Respondents

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

Whether approved for reporting ?[1] *Yes.*

For the appellants:	*Mr. Deepak Bhasin, Advocate.*
For the respondents:	*Mr. Nimish Gupta, Advocate, for respondents No. 1 to 3.* *Mr. Devender Sharma, Advocate, for respondent No.4.* *Mr. Ramesh Sharma, Advocate, for respondent No.5.*

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

This appeal is directed against the judgment and award dated 20.12.2010, made by the Motor Accident Claims Tribunal, (II), Una, H.P. in MACP RBT No. 93/2000-61/98, titled *Smt. Gurmeet Rani and others versus Sh. Deepak Kumar and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,68,000/- came to be awarded in favour of the claimants alongwith interest @ 9% per annum, with

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ?.***

Rs.1000/- as costs, hereinafter referred to as “the impugned award”, for short.

2. Claimant, driver and owner have not questioned the impugned award on any ground, has attained the finality, so far as it relates to them.

3. Appellant/insurer has questioned the impugned award on the grounds;

(i) That the insured has committed willful breach;

(ii) That the vehicle was carrying the passenger more than the permissible capacity, thus, the insurer was not liable; and,

(iii) that the amount awarded is excessive.

4. All the above grounds are not tenable and devoid of any force for the following reasons.

5. The claimants have proved by leading evidence that the driver, namely, Deepak Kumar has driven the vehicle rashly and negligently and caused the accident. The Tribunal has specifically recorded in para 20 of the impugned award that the FIR was lodged against the driver, investigation was conducted and final repot was presented against the driver. The driver and owner have not questioned the said findings.

Thus, the insurer has no right to question the said findings. Even otherwise, I have gone through the record. Prima facie there is proof on the file which is made basis for holding that the driver has driven the vehicle rashly and negligently in which the deceased sustained the injuries and succumbed to the same. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

6. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3, 4 and 5 at the first instance. The insurer had to prove these issues. Insurer has only examined Smt. Amarjit Kaur, Clerk from the office of District Transport Officer, Hoshiarpur. She has stated that the driver was having a valid and effective driving licence, the discussion of which has been made in paras 30 to 33 of the impugned award. It was for the insurer to plead and prove that the owner/insured has committed willful breach, has not led any evidence. Issue No. 5 was not pressed by the insurer. Thus, the insurer has failed to discharge the onus on these issues. The Tribunal has rightly decided these issues against the insurer.

7. The learned counsel for the appellant has argued that the vehicle was carrying the passenger more than the permissible capacity. It is for the insurer to press this issue at the relevant point of time because as on today there is only one claim petition before this Court. The insurer is at liberty to take this ground at an appropriate stage, in the appropriate proceedings.

8. The Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917,** has laid down the law. It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy 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 larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached*

by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

9. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that

> *the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."*

10. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, and FAO No. 256 of 2010 titled ***Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on 19.6.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.

11. The apex Court in case titled ***Lakhmi Chand versus Reliance General Insurance Co. Ltd.*** reported in ***(2016) 3 SCC 100***, held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the

vehicle. It is apt to reproduce para 14 of the said judgment herein.

> *“14. The National Commission upheld the order of dismissal of the complaint of the appellant passed by the State Commission. The National Commission however, did not consider the judgment of this Court in the case of B.V. Nagaraju v. Oriental Insurance Co. Ltd Divisional Officer, Hassan, 1996 4 SCC 647. In that case, the insurance company had taken the defence that the vehicle in question was carrying more passengers than the permitted capacity in terms of the policy at the time of the accident. The said plea of the insurance company was rejected. This Court held that the mere factum of carrying more passengers than the permitted seating capacity in the goods carrying vehicle by the insured does not amount to a fundamental breach of the terms and conditions of the policy so as to allow the insurer to eschew its liability towards the damage caused to the vehicle. This Court in the said case has held as under:-*
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> *"It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver. If those six workmen when travelling in the vehicle, are assumed not to have increased risk from the point of view of the Insurance Company on occurring of an accident, how could those added persons be said to have contributed to the causing of it is the pose, keeping apart the load it was carrying.*
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> *In the present case the driver of the vehicle was not responsible for the accident. Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of the*

> *owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which by themselves, had gone to contribute to the causing of the accident."*

12. This Court in a batch of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, has held that the insurer has to satisfy the awards which are on higher side.

13. **Issue No.2.** The deceased was 30 years of age at the time of accident. The claimants have pleaded his monthly income Rs.8,000/- per month. The Tribunal, after making discussion held that the deceased was earning Rs.3000/- per month and held that the claimants have lost source of dependency to the tune of Rs.2000/- per month and applied the multiplier of “17”. Thus, the amount awarded cannot be excessive in any way rather it is meager.

14. The insurer is directed to deposit the amount within 6 weeks from today in the Registry, if not already deposited. On deposit, the Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same in their bank account, strictly in terms of the conditions contained in the impugned award.

15. Accordingly, the impugned award is upheld and the appeal is dismissed.

16. Send down the record forthwith, after placing a copy of this judgment.

July 29, 2016. **(Mansoor Ahmad Mir)**
(cm Thakur) **Chief Justice.**