

IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO No.465/2011 along with FAO
No. 114/2012

Decided on : 31.7.2017

1. FAO No. 465/2011

Kalavati Verma and ors.Appellants

Versus

National Insurance Company Ltd. and ors.Respondents

2. FAO No. 114/2012

Kuldeep Verma and anr.Appellants

Versus

National Insurance Company Ltd. and anr.Respondents

Coram:

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

*Whether approved for reporting?*¹ No

For the appellant(s): Mr. B.C. Verma, Advocate, in FAO
No. 465/2011.

Mr. Digvijay Singh, Advocate, in
FAO No.114/2012

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For the respondent(s): Mr. Lalit K. Sharma, Advocate, for
respondent No.1 in FAO No.
465/2011

Mr. Ashwani K. Sharma, Senior
Advocate with Mr. Jeewan Kumar,
Advocate, for respondent No.1 in
FAO No. 114/2012.

¹ Whether reporters of the local papers may be allowed to see the judgment? Yes

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Mr. Digvijay Singh, Advocate, for respondents No. 2 and 3 in FAO No. 465/2011.

Mr. B.C. Verma, Advocate, for respondents No. 2(a) to 2(c) in FAO No. 114/2012.

Tarlok Singh Chauhan, Judge (oral):

Since both the appeals arise out of the same accident, therefore, they are taken up together for hearing and are being disposed of by a common judgment.

FAO No. 465/2011

2 This appeal was initially filed by the claimant, Rakesh Kumar, himself for enhancement of the award amount that came to be passed by the learned Tribunal in a petition instituted by the deceased/claimant. He unfortunately died on 25.9.2013. Therefore, in such circumstances, the moot question is whether this appeal is maintainable or can be prosecuted by the legal heirs of the original claimant.

3 This issue is no longer *res integra* in view of a detailed judgment rendered by a coordinate bench of this Court in ***The New India Assurance Company vs. Anit Shankta, Latest HLJ 2014(HP) 734***, wherein while rejecting the plea of the legal heirs to prosecute the appeal, it was observed as under:-

...3...

"21] In terms of the award, the compensation has been awarded in terms of money, which is an estate and estate devolves upon the legal representative.

[22] Section 2 (3) of the Code of Civil Procedure (hereinafter referred to as the "CPC") defines "decree-holder" and Section 2 (11) of CPC defines "legal representative". It is apt to reproduce Sections 2 (2), 2(3) and 2 (11) herein:

"2.

(1)

(2)

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made;

(4)

(5)

(6)

(7)

(8)

(9)

(10)

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

[23] The legal representatives in law represents the estate of the deceased person. The award is an estate in terms of the provisions of law and on the death, it devolves upon the legal representatives. Thus, the legal representatives have every right to reap the fruits of the litigation/award.

[24] The definition of word "estate" is given in The New Oxford Dictionary of English at page 629, which reads as under:

"estate: noun 1 an area or amount of land or property, in particular:

an area of land and modern buildings developed for residential, industrial, or commercial purpose. an extensive area of land in the country, usually with a large house, owned by one person or organization. all the money and property owned by a particular person, especially at death: in his will, he divided his estate between his wife and daughter. a property where coffee, rubber, grapes, or other crops are cultivated. (in South Africa) a registered vineyard producing wines made exclusively from grapes grown within its boundaries."

[25] In Black's Law Dictionary, Sixth Edition, the word "estate" has been defined at page 547 as under:

"Estate. The degree, quantity, nature, and extent of interest which a person has in real and personal property. An estate in lands, tenements, and hereditaments signifies such interest as the tenant has therein. 2 Bl. Comm. 103. The condition or circumstance in which the owner stands with regard to his property. Boyd v. Sibold, 7 Wash.2d 279, 109 P.2d 535, 539. In this sense, "estate" is commonly used in conveyances in connection with the words "right", "title" and "interest", and is, in a great degree, synonymous with all of them. When used in connection with probate proceedings, term encompasses totality of assets and liabilities of decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal. In re Adams' Estate, 148 C.A.2d 319, 306 P.2d 623, 625."

[26] Order XXII Rule 11 of CPC provides that provisions of Order XXII CPC applies to appeal also. It is apt to reproduce Order XXII Rule 11 of CPC herein:

"ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

.....

11. Application of Order to appeals. - In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal."

[27] Section 141 of CPC also mandates that the provisions of CPC applies to all miscellaneous proceedings. Having glance of these discussions, it can be safely said and held that after earning the award, the legal representatives are entitled to the said amount being estate of the deceased.

[28] The Apex Court in the year 1985 has laid down the same principles in the case titled as Melepurath Sankunni Ezhuthassan versus Thekittil Geopalankutty Nair, 1986 ACJ 440. It is apt to reproduce para 9 of the judgment herein:

"9. The position, therefore, is that had the appellant died during the pendency of his suit, the suit would have abated. Had he died during the pendency of the appeal filed by him in the district court, the appeal would have equally abated because his suit had been dismissed by the trial court. Had he, however, died during the pendency of the second appeal filed by the respondent in the High Court, the appeal would not have abated because he had succeeded in the first appeal and his suit had been decreed. As, however, the High Court allowed the second appeal and dismissed the suit, the present appeal by special leave must abate because what the appellant was seeking in this appeal was to enforce his right to sue for damages for defamation. This right did not survive his death and accordingly the appeal abated automatically on his death and his legal representatives acquired no right in law to be brought on the record in his place and stead."

[29] In a case titled as Ghisalal deceased through L.Rs. Versus Nihalsingh and others, 1992 ACJ 181, compensation was awarded in the claim petition. The claimant, feeling dissatisfied, filed appeal for enhancement and during the pendency of appeal, the claimant died and the question arose as to whether the entire claim petition had to abate or otherwise. The High Court of Madhya Pradesh, Indore Bench, while applying the principle laid down in Melepurath Sankunni Ezhuthassan' case , held that the award of compensation made in favour of the injured-claimant before his death forms a part of his estate and thus, the legal representatives have every right to claim the same. However, the appeal abated so far it relates to enhancement of compensation. It is apt to reproduce paras 26 and 27 of the judgment herein:

"26. The award of compensation made in favour of the claimant-injured before his death had apparently formed a part of his estate. Upon the instant appeal having been filed by the claimant injured the two points which required determination by this court were, firstly, the amount of enhancement for a just and fair compensation in respect of the injuries suffered by the claimant, and secondly, the liability of the respondent insurance company to pay the amount of compensation. As regards enhancement of compensation in respect of the injuries it can be said that the cause of action to sue for enhancement of compensation in respect of personal injury sustained by the claimant did not survive on the death of the claimant injured during the pendency of the appeal. But as regards the liability to pay compensation which had been determined in an award made by the learned Tribunal and as such had become an estate

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realisable from the respondents, the right to prosecute the appeal did survive for obtaining a just determination of the share of liability among the respondents inter se.

27. It is thus, clear that it may not be permissible for the legal representatives of the deceased claimant who died during the pendency of the appeal, to prosecute the appeal for enhancement of compensation in respect of injuries sustained by the deceased claimant against the respondents, as is the case here, but the legal representatives of the deceased claimant are certainly entitled to the award of compensation already made by the Tribunal in favour of the claimant before his death and to prosecute this appeal for fixing the liability of payment among the respondents inter se. Since in the instant case, it has not been proved that the owner Kailashchandra had transferred the vehicle before the date of accident which took place during the cover of the policy, it must be held that the respondent insurance company is jointly and severally liable along with the owner and the driver to pay the amount of compensation awarded.

4. Similar reiteration of law can be found in the judgment dated 11.7.2014 rendered by this Court in **FAO No.29/2010, titled Oriental Insurance Company Ltd. vs. Surinder (since deceased, Lrs) and others.**

5. Thus, it is evidently clear that it is not permissible for the legal heirs of the deceased-claimant, who died during the pendency of the appeal, to prosecute the appeal for enhancement of the compensation in respect of the injuries sustained by the

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deceased/claimant, though, the legal heirs of the deceased are certainly entitled to the award of compensation already made by the learned Tribunal in favour of the claimant before his death.

6. Having said so, the appeal at the instance of the legal heirs of the deceased-claimant is not maintainable and, therefore, is accordingly dismissed leaving the parties to bear their own costs. Pending application(s), if any, also stands dismissed.

FAO No.114/2012

7. This appeal is filed at the instance of the owner and driver of the vehicle against the impugned award dated 22.9.2011 passed by the learned Motor Accident Claims Tribunal in M.A.C. No.12-S/2 of 2009, whereby liability to pay compensation has been fastened upon them.

8. As noticed above, Rakesh Verma, the original claimant, filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 (in short, 'the Act') claiming therein compensation of Rs.13,00,000/- from the present appellants and respondent No.1 herein. Undoubtedly, the claimant died during the pendency of the appeal and his legal representatives were brought on record as respondents No. 2(a) to 2(c) respectively.

...9...

9. The case set up by the claimant was that he was working as an Accountant with Pradeep Verma, a government contractor. On 29.3.2008, vehicle bearing registration No. HP-51B-0731, which was owned by appellant No.1 herein, was deployed for removing the extracted soil from the construction site. The claimant was travelling in the aforesaid vehicle allegedly as the owner of the goods/material when it met with an accident on account of vehicle having been driven rashly and negligently by its driver, i.e. appellant No.2 herein. The matter was reported in Police Post, Sunni, District Shimla.

10. The learned Tribunal held the claimant to be a gratuitous passenger and accordingly, fastened liability of the entire award upon owner and driver of the vehicle. It is against these findings that the present appeal has been preferred by the appellants on the ground that the findings recorded by the learned Tribunal are perverse, inasmuch it held the claimant to be a gratuitous passenger.

11. I have heard learned counsel for the parties and have also gone through the record of the case carefully.

12. Section 147 of the Act deals with requirement of policies and limits of liability and the provision, as is relevant for

the purpose of the adjudication of the appeal, is reproduced as under:-

“147. Requirements of policies and limits of liability.

- 1. In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-*
 - a. is issued by a person who is an authorised insurer; and*
 - b. insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-*
 - i. Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;*
 - ii. Against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:*

Provided that a policy shall not be required-

- i. to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923, (8 of 1923.) in respect of the death of, or bodily injury to, any such employee--*
 - a. Engaged in driving the vehicle, or*
 - b. If it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or*

- c. *If it is a goods carriage, being carried in the vehicle, or*
- ii. *To cover any contractual liability.*

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.”

13. Bearing in mind the provisions, as contained in the aforesaid section, while determining the liability of the Insurance Company in respect of the passengers being carried in goods vehicle, this Court in ***Oriental Insurance Company vs. Neelam Kumari and others, 2011 (2) Shim. L.C. 335*** observed as under:-

“[7] The law with regard to the liability of the Insurance Company in respect of passengers being carried in a goods vehicle is now well settled. A three Judge Bench of the Apex Court in New India Assurance Company Ltd. v. Asha Rani and others, 2003 1 SCC 223, considered the question whether it is compulsory for the Insurance Company to cover the liability in respect of passengers travelling in a goods vehicle. This decision was in context of the un-amended Act. The Apex Court over-ruled its earlier judgment in New India Assurance Company Ltd. v. Satpal Singh, 2000 1 SCC 237 and held as follows:

"... It is held that the insurer will not be liable for paying compensation to the owner of the goods or his authorized representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of the goods or his representative dies or suffers any bodily injury."

Justice S.B. Sinha in his concurring judgment held as follows:

"25. Section 147 of the 1988 Act, inter-alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of 'public service vehicle'. Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does not speak of any passenger in a 'good carriage'.

26. In view of the changes in the relevant provisions in the 1988 Act vis-a-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the, opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

[8] This matter again come up for consideration in Oriental Insurance Company v. Devireddy Konda Reddy, 2003 2 SCC 339. The Apex Court considered the difference between the definition of 'goods vehicle' appearing in the Motor Vehicles Act, 1939 and 'goods carriage' appearing in the Motor Vehicles Act, 1988 and held as follows:-

The difference in the language of "goods vehicle" as appearing 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 the definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of "goods". Carrying of passengers in a goods carriage is not contemplated in the Act.

Thus, the Apex Court held that passengers cannot be carried in a goods vehicle.

[9] In National Insurance Company Ltd. v. Baljit Kaur and others, 2004 2 SCC 1, the Apex Court considered the impact of the amendment to the Motor Vehicles Act made in 1994. The Apex Court held that after the amendment of 1994, the Insurance Company was bound to cover liability in respect of owner of the goods or his authorized representative travelling in the goods vehicle. However, it further held that no passenger can be carried in a goods vehicle and the Insurance Company was not liable to pay compensation with respect to passengers especially gratuitous passengers. The Apex Court held thus:

20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative 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 was any premium paid to the extent of the benefits of insurance to such category of people.

[10] *The Apex Court also considered this point in National Insurance Company Ltd. v. Ajit Kumar and others, 2003 9 SCC 668. After considering the definitions and various provisions of the Motor Vehicles Act both amended and unamended, the Apex Court held as follows:-*

“The difference in the language of "goods vehicle" as appearing 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 the definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used in "goods carriage" is solely for the carriage of goods". Carrying of passengers in 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 the 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 "the WC Act"). There is no reference to any passenger in "goods carriage.”

[11] *Following the aforesaid judgments, a similar view was taken by the Apex Court in National Insurance Company v. Chinnamma and others, 2004 8 SCC 697.*

[12] In National Insurance Company Ltd. v. Cholleti Bharatamma and others, 2008 1 SCC 423, the Apex Court was dealing with a matter in which a large number of persons were travelling in a goods carriage vehicle. It was contended on behalf of the claimants that all these persons were travelling as owners of the goods and hence, the Insurance Company was liable to pay the compensation. The Apex Court rejected this contention and held as follows:-

8. The Act does not contemplate that a goods carriage shall carry a large number of passengers with small percentage of goods as considerably the insurance policy covers the death or injury either of the owner of the goods or his authorized representative.

14. While explaining the effect of Section 147(b)(i) of the Act, the Hon'ble Supreme Court in **United India Insurance Company Ltd. vs. Suresh K.K., 2008 (12) SCC, 657**, held as follows:-

"9. The Insurance policy should, inter alia, be in respect of death or bodily injury of the person carried in the vehicle. Such person may be the owner of the goods or his authorized representative. The High Court, therefore, may be correct that the owner of the goods would be covered in terms of the said provision. But the question which has not been adverted to by the High Court is as to whether the policy contemplates the liability of the owner of the vehicle in respect of a person who was in the vehicle in a capacity other than owner of the goods. If a person has been travelling in a capacity other than the owner of the goods, the insurer would not be liable. The purpose for which the provision had to be amended by Act No.54 of 1994 was to widen the scope of the liability of the insurance company.

10. It is now well settled that the term 'any person' envisaged under the said provision shall not include any gratuitous passenger. [National Co. Ltd. vs. Baljit Kaur, {(2004) 2 SCC 1}]. If the claimant had not been travelling in the vehicle as owner of the goods, he shall not be covered by the policy of the insurance.....".

15. Admittedly, the offending vehicle in the instant case was a tipper, which is primarily engaged for carrying rubble, mud, debris etc. and the same is not meant for carrying any passenger. In the case of gratuitous passenger, the Insurance Company is not liable to make any payment of compensation as the same contravenes the terms of the policy.

16. I will first advert to the pleadings of the parties. In para 4 of the claim petition, the claimant alleged that he was working as an Accountant with Pradeep Verma, a government contractor. He further averred in para 7 of the petition that he was an income tax payee. In reply filed by the appellants herein, it was averred that the claimant was working as an Accountant with Kuldeep Verma, i.e. the appellant No.1 herein. In cross-examination, the claimant had specifically admitted that appellant No.1 was the owner of the vehicle and appellant No.1 and Pradeep Verma were both his real brothers, meaning

thereby the claimant, the appellant No.1 and Pradeep Verma are real brothers.

17. No doubt, there cannot be any objection of any person working under his own brother as his employee, but the question is whether he is really an employee, as alleged. The specific case set up by the claimant was that he was an employee of Pradeep Verma, however, said Pradeep Verma was never examined by the claimant. That apart, the claimant could not produce any record whatsoever to show that he in fact had been working with Pradeep Verma, even though he was alleged to be getting a salary of Rs.84,000/- per month.

18. Notably, appellant No.1, herein, in his examination in chief as RW1 did try to help the claimant by saying that he was working as an Accountant with Pradeep Verma, but then his statement has been discarded by the learned Tribunal and rightly so, being contrary to what he had pleaded in the reply, as already referred above.

19. As noticed, there was no proof whatsoever furnished by the claimant or for that matter even by appellant No.1 to prove that claimant was in fact working as an Accountant with either of them i.e. appellant No.1 or Pradeep Verma. Therefore,

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the learned Tribunal committed no error in concluding that the deceased/claimant was travelling in the vehicle only as a gratuitous passenger and, therefore, the Insurance Company was not liable to indemnify the liability, which would have to be borne by the appellants herein.

20. Having said so, I find no merit in the appeal and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application(s), if any, also stands dismissed.

(Tarlok Singh Chauhan)
Judge

31st July, 2017
(pankaj)