

GAHC010225422014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./120/2014

PUSPA KALITA and 2 ORS.
W/O LATE TUKHESWAR KALITA

2: RIMA KALITA
D/O LT. TUKESWAR KALITA

3: KAKU KR. KALITA
S/O LT. TUKESWAR KALITA
VILL. MICHAJAN
PS. NAMTI
DIST. SIVSAGAR
ASSA

VERSUS

SHAIK FARDIN and 3 ORS.
S/OQUAMMUDDIN, B.T.ROAD, PAIKPARA, KOLKATA-700002.

2:MANAGER
RELIANCE GENEAL INSURANCE CO.
4TH FLOOR
DIHANG ARCADE
NEAR ABC
G.S.ROAD
GUWAHATI
ASSAM

3:M/S. N.R.TRANSPORT
RAJABARI
A.T.ROAD
TARAJAN
JORHAT

4:THE MANAGER CLAIMS

HDFC ERGO
GENERAL INSURANCE CO. LTD
MAYUR GARDEN
ABC
OPPOSITE RAJIB BHAWAN
G.S.ROAD
GUWAHATI
DIST. KAMRUP

Advocate for the Petitioner : MRA SHARMA
Advocate for the Respondent : MR. S K S THAKUR

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 19-04-2024

JUDGMENT & ORDER (CAV)

Heard Mr. G. Jalan, learned counsel for the appellant and Mr. R. Goswami, learned counsel for respondent.

- 2.** The claimant has challenged the judgment and order of the tribunal dated 28.01.2014 passed by the learned Member, MACT No.1, Kamrup, Guwahati in MAC Case No. 1418/2009 to exonerate the insurer of the truck to pay the awarded compensation in place of the insured i.e. owner of the vehicle. No other issue has been raised in this appeal.
- 3.** The case of the claimant is that on 27.03.2009 her husband while proceeding towards Tinsukia from Guwahati in a bus bearing No. AS-01/P- 0036 and when the bus arrived near Bokakhat town on the national highway 37, a truck bearing No. WB 23 B/4592 coming from opposite direction in a rash and negligent manner knocked down the said bus as a result of which the victim sustained grievous injury on his person and ultimately succumbed to his injuries at Jorhat Civil Hospital on the same day. According to the claimant, the accident took place due to rash and negligent driving by the driver of the truck.

- 4.** During trial, the opposite party No.1 and 3 i.e. owners of the vehicles did not participate in the proceeding and the case was proceeded ex-parte against them. The opposite party No.2 i.e. Reliance General Insurance Company Limited, insurer of the truck, contested the case before the tribunal and submitted written statement. Before the tribunal, two witnesses were examined and the claimant produced number of documents in support of her claim. The contesting opposite party No.2 i.e. insurer of the truck examined one witness i.e. DW 1 to prove the policy in respect of the vehicle which had been lapsed at the relevant time and as such took the plea that the company is not liable to pay any compensation.
- 5.** After hearing the learned counsel for the parties as well as the documents available in the record, the learned tribunal has awarded compensation amounting to Rs.4,97,000/- with interest at the rate 6% per annum in favour of the claimant and directed the opposite party No.1 i.e. owner of the alleged truck to pay the awarded amount.
- 6.** It was urged by the learned counsel for the appellant that the learned member has failed to appreciate the evidence in its true perspective in as much as there was a clear admission of DW that no documentary evidence of dispatch of Ext-E i.e. the alleged cancellation letter was produced and that no evidence of the said letter being served on the insured i.e. the owner of the truck was on record. In view of such admitted position and lack of evidence to show that the letter of cancellation of policy (Ext-E) was actually sent and received by the insured, the learned Member, MACT ought to have held that the insurer of the vehicle is to pay the awarded amount. The exoneration of the insurer to pay the compensation is bad in law and is liable to be set aside.
- 7.** It is further submitted that no information of the cancellation of the policy was sent by the insurer to the concerned RTO and there was nothing for the tribunal to presume that on the date of accident there was no policy coverage. Hence, the learned tribunal ought not to have exonerated the insurer of the vehicle to pay compensation to the claimant.

8. It is also the submission of the learned counsel for the appellant that the learned Member, MACT has failed to consider that the plea of cancellation of the policy due to alleged bouncing of cheque was not specifically pleaded in the written statement nor any additional written statement was filed by taking the said plea. Hence, the evidence regarding Ext-E and the alleged cancellation of policy being adduced by the defence witness was beyond the pleading and could not have been taken into consideration to exonerate the insurer for payment of compensation. According to learned counsel for the appellant, even assuming but not admitting that the cheque in question has dishonoured, the insurer still could not have cancelled the policy since the said cheque did not pertain to the premium paid by the insured. Since the insured has failed to prove that the cheque in question was given by the insured as premium of the alleged vehicle, hence, the impugned order exonerating the insurer to pay compensation is bad in law and is liable to be set aside.

In support of his submission, learned counsel has placed reliance on the following case laws:

- (i) *(2012) 5 SCC 234 (United India Insurance Company Ltd. Vs Laxamma and others).*
- (ii) *GHC MAC Appeal 114/2005 (National Insurance Company Ltd. Vs Nishi Bala Roy).*
- (iii) *(1998) 1 SCC 371 (Oriental Insurance Company Ltd. Vs Inderjit Kaur).*

9. On the other hand, learned counsel for the respondent/insurance company has submitted that the owner of the vehicle issued a cheque for payment of premium to the insurance company. Though, the cheque was deposited in the bank but the cheque was dishonored on the ground of insufficient fund. Thereafter, the policy was cancelled and the owner of the vehicle was intimated about dishonor of the said cheque and cancellation of policy. It is further submitted that when the insured fails to pay the premium promised, or when the cheque issued by him towards the premium is returned dishonoured by the bank concerned, the insurer need not perform his part of the promise. Payment by cheque is subject to its encashment.

11. By referring the judgment of Kerala High Court vide 2019 ACJ 43 (Smt. Prasanna B vs Kabeer P.K.), learned counsel for the insurance company has pointed out that it is settled law that the liability of the insurer to indemnify the third parties subsist unless the insurance coverage is cancelled by the insurer and intimation thereof has reached the insured and the Registering authority. The surest way to prove that the intimation has been sent by the insurer about the cancellation of the insurance coverage is to dispatch it by registered post with or without postal acknowledgement. The production of the receipt evidencing the dispatch by registered post raises a presumption in favour of the insurer that the intimation has been sent to the addressee for secured delivery. A period of one week from the date of dispatch can safely be adopted as the time necessary to serve the letter in the ordinary post. After which the intimation is presumed to have been served on the addressee. The burden is on the addressee to rebut the presumption by conclusive evidence that he did not really receive the letter and it is not a case of deliberate avoidance. The burden is not on the insurer to establish conclusively that the intimation of cancellation of insurance coverage was in fact served on insured or the Registering authority.

12. According to the learned counsel for the insurance company, one witness was examined on behalf of the insurance company to prove the fact that notice has been duly dispatched immediately on receipt of the report from the concerned bank that the cheque was dishonoured for insufficiency of fund vide exhibit-E for cancellation of policy. Under such backdrop, the learned counsel for the respondent/insurance company has prayed for dismissal of the appeal.

11. I have considered the submissions of the learned counsel for the parties I have also perused the judgment of the learned Tribunal which reveals that the learned tribunal has elaborately discussed about payment of premium for the policy of vehicle by the owner of the vehicle. As per judgment of the tribunal, from the evidence of DW-1 the cheque was dishonoured due to insufficiency of fund in the account of the insured/owner. Intimation was given to the owner vide Ext-E letter soon after dishonor of the cheque and after cancellation of the policy. The letter was sent by speed post. Although there was no documentary evidence to prove that it was received by the

owner but presumption was that it was received by him. Moreover, as the owner of the vehicle, duty casts upon him to ensure that the premium by way of cheque that he had issued in favour of the company was encashed or not. The owner has not come to the court and he has refrained from contesting the claim.

Learned tribunal also has referred the judgment of Daddappa vs National Insurance Company Ltd., reported in 2008 ACJ 581 (SC) wherein -it was held that "Accident much after the communication of cancellation of policy. Section 64 VB of the Insurance Act provides for issuance of a valid policy on receipt of payment of premium and no risk is to be assumed unless premium is received. A contract is based on reciprocal promise. Reciprocal promise by the parties is condition precedent for a valid contract."

12. Learned tribunal on perusal of the documents available in the record has held that there was no delay in communication of cancellation of policy to the owner. It was prompt by sending a letter to the owner by speed post soon after receiving intimation from the bank regarding dishonor of premium cheque. Thereafter, the learned tribunal has held that the insurer of the truck is not liable to indemnify the owner and it is the owner of the vehicle who is liable to pay compensation to the claimants.

13. After going through the evidence of DW-1 as well as documents available on record it reveals that the insurance company intimated the owner of the vehicle regarding cancellation of policy immediately on receipt of the information regarding dishonor of premium cheque. It is true that no document is available in the record regarding receipt of cancellation letter by the owner of the vehicle. But a presumption in favour of the sender for properly addressed is supported in law by Section 27 of the General Clauses Act, 1897 which is extracted herein under:

"27.Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is issued, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. In view of the aforesaid discussion, this Court is of the view that no liability can be fastened on the insurer of the alleged offending truck for any compensation payable in respect of an accident after service of the intimation in time to the owner regarding cancellation of policy. Hence, the judgment in respect of payment of compensation by the owner of the vehicle is affirmed. However, it is noticed that there was some irregularity regarding calculation of the award which is corrected accordingly.

15. Learned tribunal has fixed the monthly income of the deceased as Rs.7,000/- which is not disputed by the insurance company.

16. The Hon'ble Apex Court in the case of ***National Insurance Company Ltd. vs Pranay Sethi (supra)***, reported in ***SLP(Civil) no 25590 of 2014*** has held in case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

17. In the present case, the age of the deceased was around 58 years when the accident took place. Hence, 10% be added to the established income of the deceased i.e. Rs. 7,000/-+ Rs.700/-=Rs.7,700/-

18. As per the case of ***Sarla Verma & Ors. vs Delhi Transport Corp. & Anr*** reported in ***2009 (6) SCC 121*** the multiplier would be 7.

19. So far as the dependency is concerned, admittedly the claimant/appellant left behind his wife and two minor children. As per Sarla Verma (supra), in this case the dependent family members of the deceased was three, the deduction towards personal and living expenses of the deceased would be $\frac{1}{3}^{\text{rd}}$.

20. As per ***Pranay Shethi (supra)*** the Hon'ble Supreme Court has fixed compensation in case of death reasonable figures on conventional heads namely- Loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs.15,000/- and Rs. 40,000/- respectively. As per the impugned judgment, the aforesaid amount should be enhanced at the rate of 10% in every three years. Hence, amount of funeral expenses comes to Rs.16,500/-, consortium Rs.44,000/- and loss of estate Rs.16,500/-.

21. In view of the above discussion, the computation of compensation is awarded as follows-

(a) Annual income of the deceased=Rs.7,700/- x 12=Rs.92,400/-

(b) After deducting $1/3^{\text{rd}}$ of the income of the deceased, the amount comes to =Rs.61,600/-

(c) After multiplying with multiplier,

the amount comes to =Rs. 61,600 X 7=Rs.4,31,200/-

(d) Funeral expenses=Rs. 16,500/-

(e) Spousal consortium= Rs.44,000/-

(f) Loss of Estate= Rs. 16,500/-

Total = Rs.5,08,200/- (Rupees Five Lakh Eight Thousand Two Hundred) only.

22. In the result, the appeal is disposed of with aforesaid modification. The

compensation and award is modified as described above. The Owner of the Truck bearing No. WB 23 B 4592 Shaik Fardin is directed to deposit Rs. 5,08,200/- (Rupees Five Lakhs Eight Thousand Two Hundred) only. The compensation so awarded shall carry an interest @6% per annum from the date of filing of the claim petition till realization.

23. With the above observation, the appeal stands disposed of.

24. Send back the Trial court record.

JUDGE

Comparing Assistant