

\$~R-7

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 22nd January, 2016

+ MAC.APP. 426/2006

YOGENDER CHAND AND ORS. Appellants

Through: Mr. Mukesh Sharma, Adv.

versus

RAJESH AND ORS. Respondents

Through: Mr. Sameer Nandwani, Adv. for
R-5/Insurance

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The appellants are in appeal questioning the judgment dated 02.03.2006 of Motor Accident Claims Tribunal ("the Tribunal"), passed commonly in four different claim petitions under Section 166 and 140 of Motor Vehicles Act, 1988 ("MV Act") holding them liable to reimburse the compensation awarded and made payable, in the first instance, by M/s United India Insurance Co. Ltd. (the fifth respondent).

2. The claim petitions were filed by four different persons claiming compensation for injuries sustained while travelling in an accident that occurred on 09.06.2001 at about 7.20 AM during return journey back to Delhi in Maruti Van No.DL 4C G 6540 ("the offending vehicle"). The

first appellant admittedly is the owner of the offending vehicle and it is also undisputed that the second appellant was the driver of the offending vehicle at the time it met with an accident in the area of Karnal in Haryana allegedly on account of rash/negligent driving on his part. Concededly, the offending vehicle was insured with the fifth respondent for the period in question against third party risk though its liability was subject to the compliance with the provisions of MV Act.

3. The four claimants before the Tribunal were members of one family. They included Devi Dass (claimant in MACT case No.140/2004), his wife Panna Devi (claimant in MACT No.141/2004) and their sons Rajesh and Mahesh (claimants in MACT No.138 and 139 of 2004). It appears from the impugned judgment that Rajesh and Mahesh suffered minor injuries and were awarded compensation in the sum of Rs.5,000/- and Rs.7,500/- respectively. The injuries of Devi Dass were more serious and he was granted compensation in the sum of Rs.90,000/- having regard to the proof as to the extent of injuries, loss of earnings and medical expenses. The injuries of Panna Devi were far more serious and she was granted compensation in the sum of Rs.1,92,392/-. The element of interest was added. While the insurance company was directed to pay the amounts, the appellants herein were held liable jointly and severally to make good the compensation for which recovery rights were granted to the former (insurance company) against the first appellant (the owner), on the ground that he had committed breach of the insurance policy conditions by letting the offending vehicle to be taken on hire through M/s Tushar Travels, this as against the stipulation in the insurance contract that the vehicle would be used only for social or domestic purposes or pleasure and not for

business purposes.

4. Though the claimants (respondents No.1 to 4) have been made party respondents, they have not appeared at the hearing to contest. This is inconsequential inasmuch as the dispute is between the first appellant (owner) and the fifth respondent (the insurer).

5. The tribunal noted the contentions, and the evidence with regard to the defence, taken by the insurance company and recorded its views thereupon as under :

“g) As regards the liability, the Ld. Counsel for the Ins. Co. Sh. Rajesh Goyal, vehemently submitted that the recovery rights in this case be granted in favour of the Ins. Co. On the other hand, Sh. S. K. Tripathi, Ld. Counsel for R-1 and 2 submitted that the rights of recovery can not be granted. Sh. Rajesh Goyal, relied on the ruling of Hon’ble Kerala High Court in Jayakumar V. Rajamma I (2005) ACC 41 and Sh. S K Tripathi, relied on the ruling of Hon’ble Punjab & Haryana High Court in Rosy Joshi & ors. V. Joginder Singh & ors. 2005 ACJ 1299.

h) To support his contention, Ld. Counsel for the Ins. Co. has taken me though the evidence of R3W1 who proved the policy pertaining to the offending vehicle. He deposed that as per the terms and conditions, the vehicle can be used only for social, domestic purposes or pleasure and not for the business purposes. He has also produced the applications at Ex.R3W1/B, C, D and E of the claimants herein along with DD report, D/L and RC of the offending vehicle. He deposed that the name of the party was shown as Pappu.

i) He further deposed that the investigation was carried by one S.S. Aggarwal, which revealed that the Devi Dass, and his family have fired the Taxi from the Travel Agency. In the cross-examination on behalf of R-1 and R-2, a faint effort is made to show that the Pappu is a relative of Devi Dass. The owner of vehicle is Yogender Chand.

j) From the examination in chief of PW 1,2 and 3 I find that

the claimants deposed that they have hired the Maruti Van and PW 1 in cross-examination admitted that his brother Pappu, had made the arrangements with the Tushar Travels. In the cross-examination of PW-2, similar admissions are found. From the evidence available, it is (sic) needless to say that the vehicle can not be used for hire or reward and is only for social, domestic and pleasure purposes. The ruling relied by the Ld. Counsel for the Ins. Co. squarely applied in this case and the ruling relied by the R-1 and R-2 is distinguishable on the facts. In Rosy Joshi (supra), the deceased was travelling in a Maruti van. The court was examining whether the daily diary report was sufficient to prove that the vehicle was being driven for hire. There was no proof that the vehicle was being used for hire.

In the instant case, from the very evidence found on record, I find that the vehicle was engaged on hire by the petitioners family and this assertion was not demolished by R-1 and 2. Strange enough R-1 and R-2 have not led any evidence to show that the vehicle was not being plied on hire or reward. It was incumbent on the respondents to have discharged their onus which they have not done. Hence, I am unable to reconcile with the submissions of the Ld. Counsel for R-1 and 2. The court can not ignore the contents of Ex.PW2/5 wherein the aspect of hiring the vehicle is glaringly visible. Ld. Counsel for R-1 and R-2 is unable to over-come this admission both oral and documentary. Hence, the ruling relied by him is not applicable to the present case. In the circumstances, the respondent number 3 Ins. Co. is justified to have asked for recovery rights, which I grant herein.”

6. The learned counsel for the appellants was at pains to argue that there was no evidence adduced by the insurance company to prove that the offending vehicle had been given out on hire. He pointed out that the evidence showed that the vehicle had actually been taken by one Pappu, a relative of the claimants for journey to the holy shrine of

Vaishno Devi in Jammu and Kashmir for a family visit and there was nothing to show that the said journey was undertaken subject to hire charges being paid to M/s Tushar Travels.

7. *Per contra*, the learned counsel for the insurance company submitted that the appeal is devoid of substance as in the face of evidence showing the vehicle was on hire, it was for the first appellant to explain as to how his vehicle had been taken by the claimants for the journey and on what terms. He submitted that the evidence of the claimants positively brought out the fact that the vehicle had indeed been taken on hire through the aforesaid travel agency in which regard documentary proof was also submitted, as duly noted by the tribunal in the impugned judgment in the observations extracted above. He submitted that, during the inquiry, the appellant made no effort to refute the said part of evidence and since conclusion to such effect emerged from the material on record, the insurance company was not obliged to prove anything more.

8. The learned counsel for the appellant referred to *Narcinva V. Kamat and Another V. Alfredo Antonio Doe Martins and Ors.* (1985) 2 SCC 574; *Jameskutty Jacob V. United India Insurance Co. Ltd.* (2003) 7 SCC 131 and *National Insurance Co. Ltd. V. Laxmi Narain Dhut* (2007) 3 SCC 700, to argue that it was the burden of the insurance company to prove that there was a breach of policy condition. It was submitted that the insurance company did not lead any evidence and consequently cannot be allowed any recovery rights.

9. It is noted that in *Narcinva V. Kamat* (supra) *Jameskutty Jacob* (supra) and *Laxmi Narain Dhut* (supra), the insurance company had alleged breach of policy conditions on the ground that the drivers in the

respective accident cases were not holding valid driving licenses. In *Jameskutty Jacob* (supra), the contention of the insurance company with reference to Section 95(2) of Motor Vehicles Act, 1939 was rejected on the ground that there was no proof adduced to show that the vehicle had been used as the taxi rather than as a private vehicle. The objections raised here are different since the vehicle is shown to have been let out on hire charges, as against the basic terms of the policy.

10. The offending vehicle in the case at hand admittedly is a private vehicle. It did not have any permit for being used as a transport vehicle for being allowed to run on hire. The claimants came with a contention that they had taken this vehicle on hire through M/s Tushar Travels. This is what the documents submitted also corroborated. Reference to the role of Pappu did come in the evidence of Mahesh Kumar (PW-1). In the facts and circumstances emerging from the evidence, the role of Pappu was limited and of no import. He had only facilitated the vehicle to be taken on hire. The first appellant made no effort to explain by positive evidence as to how his vehicle was being hired out through M/s Tushar Travels.

11. It does appear that on the claim of the first appellant for benefit of insurance cover for own damage, the insurance company granted the entire benefit without demur. The evidence of R2W1, an official of the insurance company, indicates that the said claim was cleared, with the witness going to the extent of stating that no violation of terms and conditions of the policy were noticed. It may be that the insurance company granted the said benefit. But an omission at that stage of scrutiny in noticing the violation of the terms and conditions does not mean it cannot resist the claim against third party risk by referring to the

breaches of the terms and conditions of the policy later revealed.

12. It is not correct to contend that the insurance company did not lead any evidence to discharge its burden. It examined O P Kanava, Assistant Manager R3W1 to bring home its case, based on the objections taken in the pleadings denying its liability. The burden, thus, had shifted on to the first appellant (owner) to prove the facts to the contrary. Since no evidence was adduced on his behalf, the appellants have failed to explain away the breaches of the policy conditions. In above facts and circumstances, the view taken by the Tribunal cannot be faulted. The impugned judgment does not suffer from any error, illegality or infirmity.

13. The appeal is, therefore, dismissed.

R.K. GAUBA
(JUDGE)

JANUARY 22, 2016
VLD