

\$~10 & 11

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

Date of Decision: 15th January, 2016

+ MACA 1060/2012

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD.

..... Appellant

Through: Ms. Neerja Sachdeva, Adv.

versus

PUNITA DEVI & ORS.

..... Respondents

Through: Mr. Amarjeet Rai & Ms. Puja
Anand, Advs.

AND

+ MACA 1169/2012

PUNITA DEVI & ORS

..... Appellants

Through: Mr. Amarjeet Rai & Ms. Puja
Anand, Advs.

versus

BHUPINDER SINGH & ORS.

..... Respondents

Through: Ms. Neerja Sachdeva, Adv. for R-
3.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Both these appeals arise out of the judgment dated 11th July, 2012 passed by Motor Accident Claims Tribunal (hereinafter referred to as “the Tribunal”) on petition under Section 166 read with Section 140 of Motor Vehicles Act (hereinafter referred to as “MV Act”), registered as suit No. 268/2011, claiming compensation on account of death of Jitender Kumar, son of Sh. Ram Prashad in a motor vehicular accident that occurred at about 3 p.m. on 18.2.2009, near Hari Nagar, NH-8, *Anaj*

Mandi, Gurgaon, Haryana, involving truck trailer bearing registration No. RJ-02GA-0908. The claim petition had been preferred by Smt. Punita Devi (widow of the deceased) for her own behalf and on behalf of her minor son Harsh besides Ram Prashad and Jayshree Devi, parents of the deceased. In the claim petition, Bhupinder Singh was shown in the array of parties as the driver of the offending truck which was stated to be owned by Kailash Sharma and insured with Bajaj Allianz General Insurance Company Ltd.

2. The claim petition was contested by the insurance company only, the driver and owner having suffered the proceedings *ex-parte* inspite of notice. The insurance company, *inter alia*, took up the defence that it was not liable to pay compensation since there was a breach of policy condition in that the truck in question had been put on road without the requisite permit taken in terms of the provisions of MV Act. The defence of the insurance company was rejected and the claim petition was allowed awarding compensation in the sum of ₹ 14,92,480/- along with interest @ 9% per annum from the date of filing of the petition till realisation, the awarded amount having been apportioned and duly protected by suitable directions.

3. The insurance company (the third respondent before the Tribunal) has come up in MAC Appeal No. 1060/2012 questioning the denial of the recovery rights against the owner and driver of the offending truck contending that the defence about the breach of policy condition has been wrongly brushed aside. The claimants, on the other hand, have come up with MAC Appeal No. 1169/2012 seeking enhancement of the compensation on the ground that loss of dependency has been wrongly calculated on the basis of multiplier of 17 which

instead should have been taken as 18, since the deceased was 29 years old on the date of the accident. It has also been submitted that non-pecuniary damages under the heads of funeral expenses, loss to consortium, loss of estate and loss of love and affection have been awarded on the lower side in the sums of ₹10,000/- each and thus need to be enhanced.

4. Arguments on both sides have been heard and record perused.

5. Having regard to the age of the deceased (29 years), the view taken by the trial court as to the appropriate multiplier (17) cannot be faulted in view of the judgment in *Sarla Verma & Ors. vs. DTC & Anr.* (2009) 6 SCC 121.

6. Indeed, with regard to the non-pecuniary damages, the same have not been appropriately dealt with by the learned Tribunal and the award is on the lower side in view of the case reported as *Rajesh & Ors. vs. Rajbir Singh & Ors.* (2013) 9 SCC 54 wherein against a fatal accident case, the incident having occurred on 05.09.2007, the Hon'ble Supreme Court awarded non-pecuniary damages under the heads of loss of consortium, loss of care and guidance and funeral expenses in the sum of ₹ 1,00,000/-, ₹ 1,00,000/- and ₹ 25,000/- respectively. The said yardstick can be adopted for the present purposes also. Thus, the award under the said heads is modified and instead of amounts awarded by the learned Tribunal, compensation is determined on account of funeral expenses, loss of consortium, loss to estate and loss of love and affection in the sum of ₹ 25,000/- ₹ 1,00,000/-, ₹ 1,00,000/- and ₹1,00,000/- respectively. By this reckoning, an amount of ₹ 2,85,000/- is added to the compensation awarded, raising it to ₹ 17,77 480/- (Rupees Seventeen Lakhs Seventy Seven thousand and four hundred

eighty). Needless to add that the enhancement awarded shall carry interest @ 9% per annum from the date of filing of the petition till realization, the awarded amount to be apportioned in the same manner as directed by the Tribunal in the impugned judgment.

7. Since the insurance was admitted and only recovery rights were claimed, it shall be the responsibility of the insurance company to deposit the enhanced compensation with upto date interest within 30 days of this order.

8. Now, the question of recovery rights of the insurance company has to be dealt with. The contention of the insurer in this regard was rejected by the Tribunal through the following reasoning:-

“36. The respondent No. 3 disputed its liability on the ground that the owner and driver did not produce valid insurance policy, permit and effective driving licence in spite of notice U/o 12 Rule 8 CPC being served upon them. The notices were proved as Ex. R3W1/2 and R3W1/3 and their postal receipts were proved as Ex.P3W1/4 and R3W1/5. It was also submitted that the investigator of the company had inspected the record of criminal case but the permit was not available in the record of criminal case, as such since the offending vehicle was being driven without permit which was a violation of terms and conditions of the insurance policy and the Act. Thus, respondent No.3 was not liable to pay compensation.

37. I have considered the submissions of Ld. Counsel for respondent no. 3. The onus was on the insurer to prove that there was wilful breach of the terms of the policy by the insured. Respondent no. 3 proved the notice U/o 12 rule 8 CPC sent to the insured to produce the permit. However, Insurance company did not summon the record from the concerned Transport Authority to prove that respondent no. 2 did not have a valid permit to ply the vehicle.”

9. The registered owner of the offending vehicle, Kailash Sharma (impleaded as respondent No.6 in appeal taken out by the insurance company) was duly served, albeit by way of publication under Order 5 Rule 20 CPC). In spite of service he has chosen not to appear and thus, has suffered the appeal proceedings also as *ex-parte*.

10. As pointed out by the learned counsel for the insurance company, the evidence led by it during the inquiry seems to have escaped the notice of the Tribunal. Ramnik Sanchar, Senior Executive Legal had appeared as R3W1 on behalf of insurance company to depose on the strength of his affidavit (Ex.R3W1). The relevant part of his deposition may be taken note of as under:-

“I SAY THAT THE RESPONDENT No. 3 company has been impleaded in the above mentioned claim petition as insurer of vehicle bearing No. RJ-02GA-0908 vide Commercial Policy no. OG-09-1401-1803-00003147 valid for the period 07.08.2008 to 06-08-2009. The Attested copy of said insurance policy along with term and conditions is Ex. R3W1/1(COLLY).

3. I say that the respondent No. 3 company sent a Notice under Order 12 Rule 8 of Civil Procedure Code through our counsel to THE Respondent No. 1/Driver/Mr. Bhupinder Singh and the Respondent No. 2/Mr. Kailash Sharma, owner of vehicle No. RJ-02GA-0908 for production of above said original insurance Policy, a valid and effective Driving license of respondent No. 1 and a Permit of vehicle No. RJ-02GA-0908 at the time of alleged accident before this Hon'ble Court but both the respondent no.2/owner and respondent No.1/driver have failed to produce before this Hon'ble Court or provide to the Respondent No.3/Insurance Company the valid and effective Permit

of vehicle No. RJ-02GA-0908 and other documents. The signed copy of Notice under Order 12 Rule 8 of Civil Procedure Code and postal receipts are Ex. R3W1/1, Ex. R3W1/3, Ex. R3W1/4 and Ex. R3W1/5 respectively.

4. I say that the Investigation of our Company got inspection the criminal record but the copy fo Permit of vehicle No. RJ-02GA-0908 is not available/found in the criminal record. Therefore, the said vehicle No. RJ-02GA-0908 was being driven without permit at the time of accident. There is violation of Limitation as to Use clause of terms and conditions of insurance policy which have mentioned in Para Limitation as to Use on the face of Insurance Policy.

5. I say that under these circumstances, there was violation of the provisions of section 66 and 149 (1), (2) of Motor Vehicles Act, 1988 (Amended upto date) and this fact was well in the knowledge of Respondent No. 2/owner/insured that the vehicle No. RJ-02GA-0908 was being driven without permit at the time of alleged accident in spite of that he had voluntarily, willingly, illegally and violated the section 66 of M.V. Act, 1988, and the terms and conditions of Insurance Policy”.

11. There was nothing before the Tribunal to refute the stand taken by the respondent company through its official witness R3W1 to above effect. The registered owner of the vehicle despite the notice served remained absent and, thus, consciously avoided the proceedings during the inquiry. The evidence of the insurance company in above regard has, thus, gone un rebutted and unchallenged.

12. Since the insurance policy was in respect of a goods carriage vehicle, the liability of the insurance company to indemnify would be subject to provisions of MV Act. Since the truck was not driven on the

public road with a valid permit taken out in terms of the law, the insurance company cannot be denied the recovery rights [*United India Insurance Co. Ltd. vs. Lehu & others* (2003) 3 SCC 338].

13. Thus, the insurance company (appellant in MAC App. No. 1060/2012 is granted the right to recover the amount of compensation (paid/payable by it to the claimants), from the driver and owner in terms of the impugned award granted by the Tribunal, as modified in appeal by this Court through this judgment. For such purposes, the insurance company would be entitled to initiate appropriate proceedings before the Tribunal.

14. By earlier orders, the insurance company had been directed to deposit the awarded amount in terms of the impugned judgment. In spite of repeated directions, no proof about due compliance has been submitted. If the amount has already been deposited with this Court, or with the Tribunal, the claimants shall be entitled to get it released in terms of the Award and the directions as above. In case there has been default, the claimants shall be entitled to take out appropriate execution proceedings before the Tribunal for its recovery.

15. Both the appeals stand disposed of with above directions/observations.

16. The statutory deposit, if made, by the insurance company shall be refunded after it has satisfied the award.

**R.K. GAUBA
(JUDGE)**

JANUARY 15, 2016/nk