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

Date of Decision: 05.05.2016

+ MAC.APP. 69/2013

RELIANCE GENERAL INSURANCE CO. LTD. Appellant

Through: Mr. A.K. Soni, Advocate

versus

AVADH NARAIN & ORS. Respondents

Through: Mr. Peeyush Sharma and Mr. Shaorya
Mitra Tomar, Advocates for R-1
Mr. AdarshKumar, Advocate for R-3

+ MAC.APP. 71/2013

RELIANCE GENERAL INSURANCE CO. LTD. Appellant

Through: Mr. A.K. Soni, Advocate

versus

USHA & ORS. Respondents

Through: Mr. Peeyush Sharma and Mr. Shaorya
Mitra Tomar, Advocates for R-1 to 5
Mr. AdarshKumar, Advocate for R-7

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On 21.10.2007, Avadh Narain (first respondent in MACA 69/2013) was driving a motor cycle bearing registration no.DL-8S-AF 6542 (motorcycle) with his brother-in-law Surinder Kumar (husband of the first respondent in MACA 71/2013) riding on the pillion, in the area of Sector 20-21, Rohini. At about 2.30 p.m., the motorcycle was involved in a collusion against Tavera car bearing registration no.HR-55-DT 1119 (car) statedly driven in a rash / negligent manner by Amboj Kumar, it being registered in the name of Dalbir Singh and admittedly covered against third party risk by the insurance policy issued for the relevant period by Reliance General Insurance Co. Ltd. (appellant in both appeals). As a result of the collision, both the motorcycle driver and the pillion rider suffered injuries, the latter dying in the consequence.

2. Two accident claim petitions were filed before the Motor Accident Claims Tribunal (tribunal) invoking sections 140 and 166 of the Motor Vehicles Act, 1988 (M.V. Act) on 14.12.2007, one (MACT 359/2010/2007) by Avadh Narain on account of injuries suffered by him and the second, (MACT 360/2010/2007) by dependent family members of deceased Surinder Kumar seeking compensation on account of his death.

2.1 In both the said cases, Amboj Kumar and Dalbir Singh were impleaded as the respondents, they being the driver and owner of the car in addition to the appellant insurance company (insurer), on the averment that the accident had occurred due to the negligent driving of the car. It appears

both the claim cases were clubbed by the tribunal in inquiry, the evidence having been recorded on the file of the claim arising out of death.

3. By similar but separate judgments rendered on 30.04.2012, the tribunal returned finding upholding the case of the claimants in each case that the accident had occurred due to negligent driving of the car by its driver Amboj Kumar. This finding not having been challenged has attained finality.

4. In the case of injuries suffered by Avadh Narain, the tribunal awarded compensation in the sum of ₹77,728/- with interest at the rate of 9% p.a. the liability having been fastened on the insurer to pay. The computation of the compensation in the said case has not been challenged.

5. In the case arising out of claim due to death of Surinder Kumar, the tribunal awarded compensation in the sum of ₹11,64,780/- with interest at the rate of 9% p.a. from the date of filing of the petition, this being inclusive of loss of dependency computed as ₹8,94,780/-, which is under challenge.

6. The insurer by its appeals submits that the element of future prospects has been wrongly added while calculating the monthly dependency loss over and above the income notionally assessed with the help of minimum wages.

7. *Per contra*, the claimants (first to fifth respondents in MACA 71/2013) in the said case submit that the deceased was a non-matriculate but a skilled worker and therefore, minimum wages of ₹3940/- should have been adopted as the benchmark.

8. The tribunal had also directed payment of lawyers' charges in the sum of ₹7,000/- in the injury case and in the sum of ₹51,000/- in the death case, calling upon the insurer to bear the said burden. This in the submission of the insurance company was unwarranted.

9. In both the cases before the tribunal, the insurance company had taken the plea that no premium having been received against the cover note which had been issued in as much as the cheque representing the payment of premium had been returned unpaid, it could not be called upon to indemnify. This plea was rejected. The insurance company in both the appeals submits that no consideration having been paid, the insurance contract could not have been invoked by the owner of the offending vehicle to seek indemnity.

10. Arguments have been heard on all sides and record perused.

11. In the case reported as *Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, Supreme Court, *inter-alia*, ruled that the element of future prospects of increase in income will not be granted in cases where the deceased was "self employed" or was working on a "fixed salary". Though this view was affirmed by a bench of three Hon'ble Judges in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*, (2013) 9 SCC 65, on account of divergence of views, as arising from the ruling in *Rajesh & Ors. vs. Rajbir & Ors.*, (2013) 9 SCC 54, the issue was later referred to a larger bench, *inter-alia*, by order dated 02.07.2014 in *National Insurance Company Ltd. vs. Pushpa & Ors.*, (2015) 9 SCC 166.

12. Against the above backdrop, by judgment dated 22.01.2016 passed in MAC Appeal No. 956/2012 (*Sunil Kumar v. Pyar Mohd.*), this Court has

found it proper to follow the view taken earlier by a learned single judge in MAC Appeal No. 189/2014 (*HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalita Devi & Ors.*) decided on 12.1.2015, presently taking the decision in *Reshma Kumari (Supra)* as the binding precedent, till such time the law on the subject of future prospects for those who are “self-employed” or engaged in gainful employment at a “fixed salary” is clarified by a larger bench of the Supreme Court.

13. Since no strict proof was led as to the extent of earnings, the tribunal was right in proceeding to make assessment of earnings in the case of death of Surinder Kumar on the basis of minimum wages. In these circumstances, there was no occasion for future prospects to be further added. At the same time, however, the contention of the claimants in the said case is correct to the effect that they had proved by evidence, which was not challenged, that the deceased was earning his livelihood as a tailor. This would make him a skilled worker and therefore, the minimum wages of a skilled worker in the sum of ₹3940/- should have been the benchmark. The tribunal deducted 1/4th towards personal and living expenses, rightly so, in view of the fact that claimants are 5 in number, and applied the multiplier of 18, again correctly so, since the deceased was 21 years old at the relevant point of time.

14. The loss of dependency is, thus, calculated afresh, at (₹3,940/- x 3 /4 x 12 x 18) ₹6,38,280/-, rounded off to ₹6,40,000/-. Adding the non-pecuniary damages awarded by the tribunal to the said amount, the total compensation in the case comes to Rs.9,10,000/-. Needless to add, it shall carry interest as levied by the tribunal. Award in the case of death of Surinder Kumar is modified accordingly.

15. The tribunal, by the impugned judgment in the aforementioned case, had specified the amounts that would fall in the share of different claimants. The fourth respondent Ram Pratap (in MACA 71/2013) father of the deceased Surender Kumar, however, died on 26.08.2012. This fact was brought on record by CM No.11648/2013. The said application was allowed by order dated 30.07.2013 in the context of interim orders earlier passed.

16. It may be noted that, by order dated 23.01.2013 in the said appeal, the insurance company had been directed to deposit the entire awarded amount (excluding counsel's fee) with upto date interest within the prescribed period and 50% thereof was allowed to be released to the claimants in terms of the impugned judgment.

17. By order dated 30.07.2013, the share of the deceased claimant Ram Pratap was directed to be distributed equally amongst other four claimants. Since the amount of compensation has been reduced in terms of the above decision, in the case of death of Surinder Kumar, it is directed that the share of second, third and fifth respondents (claimants) shall be restricted to the amounts already received by each of them under the interim order. The entire balance outstanding would go to the first respondent (claimant) Usha (widow).

18. There being no justification for lawyer's fee directed to be paid, the directions to that effect in both the impugned judgments in these cases are set aside.

19. Coming to the issue of non-payment of premium, the plea of the insurance company in both the cases has been rejected with the following observations, almost identically worded in each cases :-

“..Defence of the respondent no.3 insurance company is that the cheque given for payment qua insurance premium got dishonoured. Burden to prove his defence is on the insurance company itself, who failed to adduce any evidence to the effect that intimation was given to the insured and respondent no.1 that cheque has been dishonoured. Hence in view of the judgment dated 17.01.2012 passed in MAC. App. 157/2010 in Oriental Insurance Co. Ltd. vs. Balwant Singh Negi & Ors. as well as judgment passed by Hon'ble High Court in case titled Krishan Kumar Vs. Chander Pal and Others reported in 2011 ACJ 1125, insurance company cannot be exempted from making payment of the compensation amount as merely taking a plea and not proving the same by way of leading any evidence is not sufficient to hold that the offending vehicle was not insured with it. Insurance company is not able to prove from any evidence that it is liable to be exonerated and is not liable to pay the compensation amount as ordered by the court. Hence, the respondent no.3 shall be liable to pay the entire compensation amount..”

20. It must be added here that in the earlier part of the judgment, impugned in the said appeal, the tribunal elaborately discussed the evidence led by the insurance company (at page 4) as under :-

“..R3W1 Satyan Kapur in his evidence by way of affidavit being Manager (Legal) stated that insurance company is not liable to pay any compensation as the offending vehicle no.HR-55DT-1119 was not insured with the respondent no.3 on the date of accident. He further stated that as per records of the insurance company the cheque no.000297 of amount ₹13,730/- issued by the insured as premium and bounced on 31.08.2007 due to insufficient funds as per memo of IDBI Bank. He proved cheque return memo as Ex. R3W1/A and cheque as Ex. R3W1/B. During cross-examination by counsel for respondent no.1 and 2 he

denied the suggestion that payment was made in cash against premium. He voluntarily stated that payment was made in cash, then a receipt must have been issued to the insured...”

21. It is the submission of the counsel for the insurer in these appeals that mere absence of proof as to intimation of the return of the cheque unpaid could not have resulted in the plea, atleast for recovery rights to be granted, being rejected.

22. The plea of the owner of the offending vehicle has been that premium was paid by cash. No evidence has been led in support of the said contention. If payment were actually paid in cash, a receipt was bound to be insisted upon, issued and taken. The insurance company having proved by evidence which cannot be disbelieved that the cheque was dishonoured, the burden to prove that the payment had been made shifted on to the owner. No evidence having been led in rebuttal, the owner has miserably failed to discharge the said burden and therefore, the plea of the insurance company that no liability to indemnify could be invoked by the owner must be accepted as the insurance policy cannot be treated as a valid contract in absence of consideration.

23. In above view, while the insurance company would not get absolved of its responsibility to satisfy the third party claims, it is held entitled to recover the amounts paid in these two claim cases from the owner of the offending vehicle for which it shall be at liberty to take out appropriate proceedings before the tribunal.

24. The balance of the amounts lying in deposit in each case and liable to be paid shall now be released to the claimants in terms of the above directions.

25. The amounts deposited in excess, if any, however, shall be refunded with statutory deposits , if made, to the insurance company.

26. The appeals are disposed of in the above terms.

MAY 05, 2016
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R.K. GAUBA
(JUDGE)

