IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.1627-2010 (O&M)
Date of decision:30.04.2019

New India Assurance Company Ltd.

…. Appellant

Versus

Rajbir Singh and others

….Respondents

CORAM : HON'BLE MR.JUSTICE ARUN KUMAR TYAGI

Present : Mr. Vinod Gupta Advocate
for the appellant.

Mr. Rajesh Lamba, Advocate
for respondents No.1 and 2.

Mr. Shiv Kumar, Advocate
for respondent No.3.

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ARUN KUMAR TYAGI, J.

1. The appellant-Insurance Company has filed present appeal seeking setting aside of award dated 13.01.2010 passed by the learned Motor Accidents Claims Tribunal, Faridabad (for short 'the Tribunal') in **MVA Petition RBT No.153 of 2007/2008 titled as Rajbir Singh and another Vs. Manoj Kumar and another** whereby compensation of ₹2,88,400/- was awarded with costs and interest to claimants on account of death of Rakesh Kumar in a motor vehicle accident, which took place on 11.07.2007.

2. For the sake of convenience, the parties are referred to by their description in the claim petition.

3. The claimants-parents of the deceased filed petition under Section 166/140 of the Motor Vehicles Act, 1988 (for short 'the M.V.Act') on the averments that on 10.07.2007 in the night Rakesh Kumar (since deceased) hired Maruti Van bearing registration No.HR-29V-0230 owned and driven by respondent No.1 for going from Ballabgarh to village Nathusari Chopta (Hisar). Rakesh Kumar, Mukesh, Naveen, Jaspal Kumar, Manoj Pathania, Om Parkash, Suresh and Sardar Singh were sitting in the Maruti Van. When at about 1:30 a.m. they reached near Jagat Palace Hotel on National Highway No.10 in the area of police station Agroha (Hisar), a dog suddenly came on the road but the Maruti Van was being driven by respondent No.1 at such high speed that respondent No.1 could not control the Maruti Van which struck against the ‘Pulia’ (culvert) and turned turtle due to which all the occupants of the Maruti Van suffered serious injuries. All the injured were taken to Agrasen Medical College, Agroha (Hisar) where the attending doctor declared Rakesh Kumar dead. Respondent No.1, in order to avoid his liability, lodged Daily Diary Report No.7 dated 11.07.2007 in Police Station Agroha cleverly asserting that there was no negligence on his part in causing of the accident.

4. While pleading that deceased Rakesh Kumar was aged about 25 years and earning ₹5,321/- per month by working

as mechanic in Maruti Udyog Ltd. through Contractor M/s Tirupati Associates, Gurgaon at the time of the accident and claiming themselves to be dependents and legal representatives of the deceased, the claimants prayed for award of compensation of ₹10,000,00/- with costs and interest at the rate of 18% per annum against respondent No.1-owner/driver and respondent No.2-insurer jointly and severally.

5. Initially the claim petition was filed under Section 163-A of the M.V. Act which was by amendment converted in petition under Section 166 of the M.V. Act as per order dated 11.02.2002 passed by the Tribunal.

6. Notice of the claim petition was issued to the respondents. In his written statement respondent No.1 took objections as to maintainability, want of locus standi and cause of action, estoppel and suppression of facts. Respondent No.1 denied the accident and also lodging of the Daily Diary Report by him. Respondent No.1 also denied his liability while pleading that the vehicle was insured with respondent No.2 and respondent No.1 had a valid and effective driving licence at the time of accident.

7. In its written statement respondent No.2 took objections as to maintainability, want of locus standi and cause of action, respondent No.1-owner/driver not having valid and effective driving licence and respondent No.1 having committed breach of the terms and conditions of the insurance policy by

plying the Maruti Van as **Taxi**. Respondent No.2 also controverted material averments made in the petition and denied its liability.

8. Issues were framed on the basis of pleadings of the parties and evidence produced by the parties was recorded. On consideration of the material on record and the submissions made by the learned Counsel for the parties, the Tribunal held that Rakesh Kumar died in accident caused by rash and negligent driving of Maruti Van bearing registration No.HR-29V-0230 by respondent No.1-owner/driver. The Tribunal held the deceased to be aged about 24 years, assessed his income as ₹5,838/- per month, made deduction of 50%, applied multiplier of 8 and by adding amount of ₹10,000/-towards last rites awarded compensation of ₹2,88,400/- to the claimants with costs and interest at the rate of 6% per annum. The Tribunal held that the respondent No.1 being owner/driver and respondent No.2 being insurer are jointly and severally liable for payment of compensation to the claimants and accordingly directed the respondents No.1 and 2 to jointly and severally pay the compensation amount with costs and interest as directed.

9. Feeling aggrieved, respondent No.2-Insurance Company has preferred present appeal against the above-said award.

10. I have heard arguments addressed by the learned Counsel for the parties and gone through the record.

11. Learned Counsel for the appellant-Insurance Company has argued that in Daily Diary Report No.7 dated 11.07.2007 Ex.P-18, proved by PW-3 EHC Subhash Chander to have been lodged by respondent No.1-owner/driver of offending Maruti Van bearing registration No.HR-29V-0230 in Police Station Agroha, Hisar, respondent No.1-owner/driver had mentioned that deceased-Rakesh Kumar had hired his Maruti Van. The insurance policy of the Maruti Van copy Ex.R-3 did not cover the use of the Maruti Van for hire or reward. As per his own admission respondent No.1-owner/driver of Maruti Van was using the same for carrying passengers on hire in breach of the terms and conditions of the insurance policy and the appellant-Insurance Company was thereby exonerated from its liability to indemnify respondent No.1-owner/driver for payment of compensation to the claimants. Therefore, the impugned award holding respondent No.2-Insurance Company to be jointly and severally liable for payment of compensation to the claimants may be set aside.

12. On the other hand learned Counsel for respondent No.1-owner/driver of Maruti Van has argued that the accident took place while saving the stray dog which came on the road all of a sudden without there being any negligence on the part of respondent No.1-owner/driver so as to subject him to liability for payment of compensation.

13. Learned Counsel for respondent No.1-owner/driver has further argued that respondent No.1-owner/driver was not

using the Maruti Van for carrying passengers on hire and did not ply the Maruti Van as Taxi.In the absence of cogent and reliable direct evidence of use of Maruti Van for hire, liability could not be fastened on respondent No.1-owner/driver on the basis of contents of the Daily Diary Report. In support of this argument learned Counsel for respondent No.1-owner/driver has relied on the judgment of Hon'ble Coordinate Bench of this Court in **Kiran Rani and others Vs. PEPSU Road Transport Corporation and others, VOL.CXLV (2007-1) the Punjab Law Reporter 507**.

14. Learned Counsel for respondent No.1-owner/driver has further argued that respondent No.1 had valid and effective driving licence. Respondent No.2-Insurance Company has failed to prove breach of the terms and conditions of the insurance policy by respondent No.1-owner/driver. Respondent No.2-Insurance Company is not exonerated from its liability to indemnify respondent No.1-owner/driver and is jointly and severally liable to pay the compensation to the claimants. Therefore, the appeal may be dismissed.

15. Learned Counsel for the claimants has argued that the facts of the present case of the Maruti Van having struck against 'Pulia' (culvert) and turned turtle warranted applicability of the doctrine of res ipsa loquitur. Respondent No.1-owner/driver has failed to discharge the onus of rebutting presumption of negligence on his part being the cause of accident. By the cogent and reliable oral and documentary evidence produced by the

claimants, the accident is proved to have been caused by rash and negligent driving of the Maruti Van by respondent No.1.

16. Learned Counsel for the claimants has further argued that the Tribunal did not award just and adequate compensation which may be enhanced and respondent No.1-owner/driver and respondent No.2-Insurance Company may be directed to jointly and severally pay the same. In case the respondent No.2-Insurance Company is exonerated from its liability to pay compensation then it may be directed to first pay the compensation amount to the claimants and then recover the same from the respondent No.1-owner/driver.

17. The question which first arises is as to whether the accident occurred due to rash and negligent driving of the Maruti Van by respondent No.1.

18. To prove their case as to Rakesh Kumar having died due to accident caused by rash and negligent driving of Maruti Van by respondent No.1, the claimants examined Jaspal as PW-4. PW-4 Jaspal testified by way of his affidavit Ex.PW-4/A that respondent No.1 was driving the Maruti Van in a very high speed due to which he could not control the same when he tried to save the dog which suddenly came in front of the Maruti Van and the Maruti Van turned turtle after hitting the 'Pulia' (culvert) on the road. To rebut the evidence of PW-4 Jaspal, respondent No.1 appeared in the witness box as RW-1 and testified by way of affidavit Ex.RW-1/A that all of a sudden a dog came in front of the

Maruti Van and when he tried to save the dog he lost control due to which the Maruti Van struck against the 'Pulia' (culvert). However, it is important to note that in his cross-examination RW-1 admitted that the road, which was 15 feet wide, was clear at that time. Since the road was wide enough and clear, respondent No.1 could stop the vehicle by controlling and steering Maruti Van in safe direction had he been driving the Maruti Van at proper speed.The facts that the Maruti Van became out of control, struck against 'Pulia'(culvert) and turned turtle warrant applicability of the doctrine of res ipsa loquitur and speak for themselves. In **Chaman Lal Vs. Anil Kumar and other : 2007(1) RCR (Civil) 395** it was held by an Hon'ble Coordinate Bench of this Court that if a driver of a vehicle is not able to control or stop the vehicle when an animal suddenly comes on its way and takes the vehicle on wrong side, that is by it itself sufficient to prove that the driver was not driving in normal speed and was rash and negligent in driving the vehicle. Facts of the present case are similar and in the present case inability of respondent No.1 to control or stop the Maruti Van when the stray dog suddenly came in front of the same by itself proves that respondent No.1 was driving the Maruti Van at very high speed, rashly and negligently and the accident was caused due to rash and negligent driving of the Maruti Van at very high speed by respondent No.1. The Tribunal has rightly relied and acted upon the oral and documentary evidence produced by the claimants and properly appreciated the evidence. The findings of the Tribunal are not contrary to the material evidence on record and are not perverse and are not, therefore, liable to be set aside.

19. The question which next arises is whether respondent No.1 was using the Maruti Van on hire and thereby committed breach of the terms and conditions of the insurance policy.

20. In the present case, the claimants examined EHC Subash Chander, Police Station Agroha District Hisar as PW-3 who proved by producing summoned record that Daily Diary Report No.7 dated 11.07.2007 copy Ex.P-18 was recorded on the statement of respondent No.1-owner/driver. In the above-said Daily Diary Report, respondent No.1 had stated that deceased-Rakesh Kumar had **hired** his Maruti Van. In his cross-examination by learned Counsel for respondent No.2-Insurance Company, PW-2 Rajbir Singh stated that his son had told him before leaving Ballabgarh for Hisar that the Maruti Van was hired by him as Taxi for ₹3,000/- and that he had paid ₹500/- to respondent No.1 towards the fare out of the amount of ₹3,000/-. PW-3 Rajbir Singh also admitted that statement copy Ex.R-1 was bearing his signature as well as signature of his wife. In statement copy Ex.R-1 also it was mentioned that his son Rakesh Kumar was going along with his friends in hired Maruti Van for attending marriage of their friend. To rebut this evidence respondent No.1 appeared in the witness box as RW-1 and testified that on the material date he was going with his neighbour-friend Rakesh Kumar and his 3-4 companions to Nathusari Chopta (Hisar) for

attending some marriage.He had purchased the Maruti Van for his business of property dealing and the Maruti Van was for his personal use. RW-1 Manoj Kumar also averred in his affidavit that the police obtained his signatures on blank paper and he did not know what was written in the same. However, in his cross-examination by learned Counsel for respondent No.2 RW-1 Manoj Kumar admitted that **the police of Police Station Agroha registered Daily Diary Report copy Ex.P-18 on his statement and the same is correct**. Therefore, the averment made by RW-1 Monaj Kumar that the police obtained his signature on blank papers and he did not know what was written on the same is proved to be wrong by his own admission as to the contents of Daily Diary Report copy Ex.P-18 being correct. Testimony of RW-1 Manoj Kumar that the Maruti Van was for his personal use and that he took the Maruti Van on the material date on the asking of his friend Rakesh Kumar is proved to be wrong by his own admission in Daily Diary Report copy Ex.P-18 that deceased-Rakesh Kumar had brought his Maruti Van on hire. By the oral and documentary evidence on record and his own admission in Daily Diary Report copy Ex.P-18 respondent No.1-owner/driver is proved to have used his Maruti Van for carrying deceased-Rakesh Kumar and his friends from Ballabgarh to Nathusari Chopta (Hisar) on hire.

21. In **Kiran Rani and others Vs. PEPSU Road Transport Corporation and others, VOL.CXLV (2007-1) the**

Punjab Law Reporter 507 (relied upon by the learned Counsel for respondent No.1-owner/driver) it was held by an Hon'ble Coordinate Bench of this Court that the Tribunal cannot draw any inference from the contents of the FIR to foist liability upon the driver of the vehicle involved in the accident and the Tribunal has to decide the matter on the strength of the evidence led in the case. Since in the present case there is cogent and reliable evidence to foist liability upon respondent No.1-owner/driver, observations in **Kiran Rani's Case (Supra)** are not of any help to respondent No.1-owner/driver.

22. A perusal of the insurance police copy Ex.R-3 shows that the Maruti Van was insured by the respondent No.2-Insurance Company subject to limitations as to its use mentioned therein. As per contractual stipulations in the insurance policy copy Ex.R-3 enumerating the limitations as to use, the Maruti Van insured by respondent No.2-company could be used only for social, domestic and pleasure purposes and for the insured's business. **The policy did not cover the use for : (1) Hire or reward** (2) Carriage of goods (other than samples or personal luggage) (3) Organized racing (4) Pace making (5) Speed testing (6) Reliability trials (7) Any purpose in connection with motor trade. Since respondent No.1-owner/driver used his Maruti Van for carrying deceased-Rakesh Kumar and his friends from Ballabgarh to Nathusari Chopta (Hisar) on hire, respondent No.1-owner/driver thereby committed breach of the terms and

conditions of the insurance policy. It may also be observed here thatthe Maruti Van was not insured as commercial vehicle-taxi. In his cross-examination, RW-1 Manoj Kumar also admitted that he did not have any permit for using the Maruti Van as Taxi. Respondent No.1-owner/driver is also proved to have used the Maruti Van as Taxi without any permit.

23. In **National Insurance Co. Ltd. Vs. Chella Bharathamma 2004 (4) RCR (Civil) 399 (SC)** it was held that absence of permit constitutes infraction of the insurance policy entitling the Insurance Company to its exoneration from its liability to indemnify the insured.

24. Since respondent No.1-owner/driver is proved to have committed breach of the terms and conditions of the insurance policy, respondent No.2-Insurance Company is thereby exonerated from its liability to indemnify respondent No.1-owner/driver for payment of compensation to the claimants.

25. However, in view of the observations made by Hon'ble Supreme Court in **National Insurance Company Limited Vs. Swaran Singh and others : 2004 ACJ 1** (para No.99 to 102 and para No.105) and **Shamanna and another Vs. Divisional Manager, Oriental Insurance Co. Ltd. and others : 2018 (4) RCR (Civil) 26**, respondent No.2-Insurance Company will be liable to first pay the amount of compensation to the claimants and then recover the same from respondent No.1-owner/driver of the Maruti Van.

26. The question which next arises is as to whether the claimants are entitled to more compensation and if the answer is affirmative, whether enhancement can be ordered in exercise of the powers under Order 41 Rule 33 of the CPC.

27. So far as the question as to quantum of compensation is concerned, it may be observed that in the present case, in view of the decision of Hon'ble Supreme Court in **National Insurance Company Limited Vs. Pranay Sethi and others, 2017 (4) R.C.R. (Civil) 1009,** delivered on **31.10.2017** subsequent to the passing of award dated **13.01.2010** in the present case, the claimants would be entitled to enhancement of compensation awarded by the Tribunal due to addition in the income of the deceased of 40% towards future prospects and application of multiplier of 18 as per age of the deceased instead of the age of the claimants and award of amounts specified in the abovesaid judgment to be awardable under conventional heads.

28. So far as the question as to enhancement of the compensation in exercise of powers under Order 41 Rule 33 of the CPC is concerned, in **Ranjana Prakash Vs. Divisional Manager and another : 2011(4) RCR (Civil) 218** Hon'ble Supreme Court held that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections but if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants

can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. In that case Hon'ble Supreme Court observed as under:-

> "7. This principle also flows from Order 41 Rule 33 of the Civil Procedure Code which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. **Order 41 Rule33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief.** For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.
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> 8. Where an appeal is filed challenging the quantum of compensation, irrespective ofwho files the appeal, the appropriate course for the High Court is to examine the factsand by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. **The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal**

> **by the claimants seeking enhancement of compensation**.” (emphasis supplied)

29. In the present case respondent No.2-Insruance Company has filed the present appeal for smaller relief of setting aside of the award fastening joint and several liability on it while claiming its exoneration from liability on the ground of use of the Maruti Van by respondent No.1-owner/driver for hire in breach of the terms and conditions of the insurance policy. Respondent No.2-Insurance Company has not challenged the findings as to the accident having occurred due to rash and negligent driving of the Maruti Van by respondent No.1-owner/driver and also quantum of compensation. It is also pertinent to observe here that the claimants did not file any appeal or cross-objections for enhancement of the compensation awarded to them by the Tribunal.

30. In view of the peculiar facts and circumstances of the present case of filling of the present appeal by respondent No.2-Insurance Company for smaller relief of its exoneration from joint and several liability on the ground of breach of the terms and conditions of the insurance policy and not filing of any appeal or cross-objections by the claimants and in view of the observations made by Hon’ble Supreme court in its judgment in **Ranjana Prakash’s Case (Supra)** the question of enhancement of the compensation awarded to the claimants cannot be gone into and

the bigger relief of enhancement of compensation cannot be granted to the claimants.

31. In view of the above discussion, the appeal is allowed with no order as to costs of the present appeal and the award dated 13.01.2010 passed in the MACT case is modified to the extent that respondent No.2-Insurance Company is not liable to indemnify respondent No.1-owner/driver of the Maruti Van for payment of compensation to the claimants but respondent No.2-Insurnace Company shall first pay the amount of compensation to the claimants and then recover the same from respondent No.1-owner/driver of the Maruti Van.

(ARUN KUMAR TYAGI)
JUDGE

30.04.2019
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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No