IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-7310-2017(O&M)
Date of decision:-8.7.2019

Iffco Tokio General Insurance Company Ltd.

...Appellant

Versus

Smt.Birmati and others

...Respondents

CORAM: HON'BLE MR.JUSTICE H.S.MADAAN

Present: Mr.Neeraj Khanna, Advocate and
Mr.Ravinder Arora, Advocate
for the appellant.

Mr.Dharampal, Advocate for
Mr.Vivek Khatri, Advocate
for respondent No.4.

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H.S. MADAAN, J.

Smt.Birmati aged about 40 years – wife, Ms.Kirtika, aged about 19 years – daughter and Master Ankit, aged about 17 years – minor son of Sh.Pawan Kumar, an unfortunate victim of a road side accident had brought a claim petition under Section 166 of the Motor Vehicles Act, 1988 against respondents i.e. Virender – driver-cum-owner and Iffco Tokio General Insurance Company Ltd. – insurer of Auto Rickshaw bearing registration No.HR-63C-4888 (hereinafter referred to as the offending vehicle), claiming compensation to the tune of Rs.50 lacs.

As per the case of the petitioners/claimants, on 24.7.2015, Sh.Pawan Kumar along with S/Sh.Ramphal son of Hukam Chand, Sanjay and Rajender was going to Sampla from Chhara by the offending vehicle driven by respondent No.1; that Pawan Kumar was sitting on right side of driver – Virender, whereas Ramphal, Sanjay and Rajender were sitting on the back seat of the offending vehicle; that respondent 1 – Virender was driving the offending vehicle at a very high speed rashly and negligently; that Pawan Kumar and other passengers had asked respondent No.1 – Virender to drive it in a proper manner but to no effect, resultantly the offending vehicle turned turtle on its right side and Pawan Kumar came underneath the offending vehicle and died at the spot, in that way respondent No.1 had caused the accident by his rash and negligent driving of the offending vehicle, resulting in death of Pawan Kumar; that formal FIR No.438 dated 24.7.2015 for the offences under Sections 279 and 304-A IPC was got recorded by Ramphal son of Hukam Chand, resident of village Chhara, District Jhajjar; that postmortem examination was performed on the deadbody of Pawan Kumar.

On getting notice of the claim petition, both the respondents had appeared and contested the claim petition.

In the written statement filed on behalf of respondent No.1, he had denied that any accident had taken place on 24.7.2015 at about 4:20 a.m. Such respondent, however admitted that he is owner of the offending vehicle.

In the written statement filed on behalf of respondent No.2 – insurance company, it also took up various legal objections contending that terms and conditions of the insurance policy had been violated; that no cause of action arose to the claimants to bring the claim petition; that respondent No.1 was not having a valid and effective driving licence at the time of accident and the vehicle in question was falsely involved by the claimants in collusion with the police; that the claimants had not approached the Court with clean hands. On merits, the insurance company contended that the offending vehicle was not insured with it at the material time, so the answering respondent was not liable to pay any compensation.

In the end, both the respondents prayed for dismissal of the claim petition.

On the pleadings of the parties, following issues were framed:-

1. Whether the accident took place due to rash and negligent driving of vehicle bearing registration No.HR-63-C-4888, driven by respondent No.1, as alleged by the claimant? OPP.
2. If issue no.1 is proved in favour of claimants, whether the claimants are entitled to get compensation against respondent no.1 & 2 and if so, to what amount and from which, as prayed for? OPP.
3. Whether respondent no.1 was not having valid and effective licence at the time of accident? OPR-2.
4. Whether respondent no.2 has violated the terms and conditions of Insurance Policy, Route Permit etc.? OPR-2.
5. Relief.

Both the parties led evidence in support of their respective claims.

In support of their case, the claimant No.1 had got her statement recorded as PW1 besides examining Sh.Ramphal as PW2, Sh.Virender as PW3 and Sh.Vivek Jain as PW4. The petitioners had also tendered some documents.

On the other hand, the respondents had examined Smt.Nirmala Devi as RW1, Sh.Sumit Kataria as RW2, Sh.Virender as RW3, Sh.Vivek Jain as RW4 besides tendering some documents.

After hearing arguments, the Tribunal decided issue No.1 in favour of claimants and against the respondents, issue No.2 in favour of the claimants and against the respondents, issues No.3 and 4 in favour of respondent No.1 and against respondent No.2. Resultantly while allowing the petition vide award dated 25.10.2016, the Tribunal granted compensation of Rs.10,82,800/- along with interest @ 7.5% per annum from the date of filing of the petition till realization, payable by both the respondents jointly and severally. The manner in which the compensation is to be apportioned is also given in the award.

Such award left the Insurance Company aggrieved and it has knocked at the door of this Court praying that the appeal be accepted, the award under challenge be set aside.

Notice of the appeal was issued to the respondents. Respondents No.1 to 5 put in appearance through counsel.

I have heard learned counsel for the parties besides going through the record.

Though in the written statement, the insurance company had taken up a plea that terms and conditions of the insurance policy were violated, therefore, the insurance company should be absolved of its liability to indemnify the insured with respect to liability to pay the compensation amount. On the basis of the pleadings and considering the evidence adduced by the parties, the Tribunal has returned a finding that the vehicle in question belonging to respondent No.1 was duly insured with respondent No.2 vide insurance policy, however, the insurance company had not led any evidence to show that respondent No.1 had violated any term and condition of the insurance policy.

Learned counsel for the appellant – insurance company has argued that the auto-rickshaw was carrying passengers more than permissible and was overloaded inasmuch as the deceased was sitting with him on the front seat, as such insurance company is absolved of its liability. However, I do not find any merit in that contention. The respondent – insurance company has neither led any evidence nor raised that plea before the Tribunal in that regard.

Learned counsel for respondent No.4 has referred to authority ***National Insurance Company Limited Versus Bajrang Gendlal Kumbhre and another, 2018(2) An.WR 226*** by Nagpur Bench of Bombay High Court, wherein dealing with case where the insurance company was challenging to avoid liability for the reason that the accident had taken place due to overloading of passengers in an auto rickshaw. It was observed that the risk of the petitioner was covered by the contract entered into between the owner and insurer of the vehicle in terms of Section 147 of the Motor Vehicles Act and overloading of auto rickshaw could not be said to be a fundamental breach and as liability of the insurance company was limited to six plus one, the appellant was one amongst those six persons since other passengers had not filed any claim against insurance company. In this case also, there is nothing on record to show that any other passenger travelling in the auto rickshaw had suffered injuries or that any other claim petition has been filed by any other injured or legal representatives of deceased passenger.

Learned counsel for respondent No.4 had further referred to Apex Court judgment ***B.V. Nagaraju Versus M/s Oriental Insurance Co. Ltd., 1996(3) PLR 87*** wherein the factum of number of passengers travelling in a vehicle, which was more than permitted was not held to be a fundamental breach of contract so as to disentitle the the insured from being indemnified for the damage caused to the vehicle. Learned counsel has further referred to Division Bench judgment of Kerala High Court i.e. ***T.R. Parukutty and others Versus Kerala State Road Transport Corporation and others, 2004(2) ACC 134*** wherein it was observed that overloading of vehicle will not oust the liability of the insurance company. Another judgment referred to was ***National Insurance Co. Ltd. Versus Anjana Shyam & Ors., 2007(4) R.C.R.(Civil) 30*** by the Apex Court when a bus carrying 90 passengers against carriage permit of 42 passengers had fallen in a Nallah and 26 passengers had died, whereas 64 had received injuries, it was observed that the insurance company was liable to meet awards in respect of 42 passengers only.

Under the circumstances, I find that the insurance company cannot avoid liability for the said reason. Though learned counsel for the appellant insurance company had raised an argument with regard to legality of driving licence of the driver of the offending vehicle but the

Motor Accidents Claims Tribunal in light of the facts and circumstances of the case and evidence adduced by both the parties has returned a specific finding that respondent No.1 was having a legal and valid driving licence at the time of accident and I do not see any reason to differ with the Tribunal on the said point.

With regard to quantum of compensation awarded, the Tribunal in view of the age entered in the postmortem report Ex.P7 of the deceased has observed that he was aged about 48 years at the time of accident and has taken his monthly income to be Rs.8,400/- per month discarding the version of the claimants that he was earning Rs.9,048/- by working as a Ward-boy in Glaze Services Private Limited, Okhla Industrial Estate, Phase-III, New Delhi, in addition to it doing agricultural work and his total income was Rs.20,000/- per month. Since the claimants had failed to adduce sufficient, cogent and convincing evidence in that regard, the Tribunal had rightly taken income of the deceased to be Rs.8,400/- per month. Keeping in view the prevailing wages claimed by manual workers even in the region at the relevant time, the amount certainly be not taken to be on higher side.

The Tribunal had taken the monthly income of deceased to be Rs.8,400/- per month. In view of the ratio of authority ***National Insurance Company Limited Versus Pranay Sethi and Ors., 2017(4) RCR(Civil)1009,*** in such an eventuality 25% of the amount is to be added towards future prospects. However, the Tribunal had not given any amount towards future prospects.

Considering the number of dependents upon the deceased to be three, the Tribunal ought to have deducted 1/3rd of the amount. It has wrongly been observed that number of dependents was six, when as a matter of fact only three persons i.e. widow, minor daughter and minor son of the deceased had filed the claim petition.

The Tribunal has used multiplier of 13, which keeping in view the age of the deceased has been properly used.

However, though the Tribunal has fallen in error in not adding any amount towards future prospects, in deducting 1/4th of the amount when it should be 1/3rd towards personal expenses but since the claimants have not filed any cross appeal or cross-objections, I do not find it proper to grant such benefits to them.

Under the circumstances, I allow the dependency amount to remain at Rs.6,300/-, annual dependency to be Rs.75,600/- (6,300 x 12) and after applying multiplier of 13, the compensation comes out to Rs.9,82,800/-.

The Tribunal has awarded a sum of 25,000/- towards funeral expenses, Rs.50,000/- to claimant No.1 on account of loss of consortium and Rs.25,000/- to the claimants towards loss of love and affection. However, in view of the ratio of authority ***National Insurance Company Limited Versus Pranay Sethi and Ors.***(supra), the claimants are entitled to get compensation under conventional heads i.e. Rs.15,000/- on account of loss of estate, Rs.40,000/- towards loss of consortium and Rs.15,000/- as funeral expenses, total Rs.70,000/-. The total compensation comes out to Rs.9,82,800 + 70,000 = 10,52,800/-.

The Tribunal has wrongly awarded compensation of

Rs.10,82,800 /-. The same is reduced to Rs.10,52,800/-. The claimants would be entitled to get interest @ 7.5% per annum from the date of filing of the claim petition till actual realization on the amount of Rs.10,52,800 /-. Other terms and conditions in the original award shall remain the same. Amount if paid in excess be refunded by the claimants at the earliest.

With such modification, the appeal is allowed partly with costs.

8.7.2019 **(H.S.MADAAN)**
Brij **JUDGE**

Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No