AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK
MACA No.670 of 2007

<u>MACA No.670 of 2007 & 1071 of 2007</u>

Gande Minz and Others ***(in MACA No.670/2007)***

General Manager, National Insurance Company Ltd. ***(in MACA No.1071/2007)***

.... ***Appellants***

Ms. S. Mohanty, Advocate (in MACA No.670/2007)
Mr. A. Das, Advocate (in MACA No.1071/2007)

-versus-

Pankaj Kumar Patel (since dead) through his LRs and Another ***(In MACA No.670/2007)***

Ganda Minz and Others ***(In MACA No.1071/2007)***

.... ***Respondents***

Mr. A. Das, counsel for Respondent No.2
(in MACA No.670 of 2007)

Ms. S. Mohanty, counsel for Respondents 1 to 3
(in MACA No.1071 of 2007)

CORAM:
SHRI JUSTICE B. P. ROUTRAY

<u>ORDER</u>
19.12.2022

<u>Order No.</u>

17. 1. The matters are taken up through hybrid mode.

2. Heard Ms. S. Mohanty, learned counsel for the claimants and Mr. A. Das, learned counsel for insurance company.

3. Though the matters are listed for orders, but on the request of both parties the same are taken up for final hearing.

4. Ms. Mohanty seeks and permitted to correct the consolidated cause title in the court.

5. Both the appeals being arise out of same common impugned judgment, are heard together and disposed of by this common order.

6. Both the appeals are directed against the impugned judgment dated 20th April, 2007 of learned 2nd MACT, Northern Division, Sambalpur passed in Misc. (A) Case No.379 of 1997 (SN) and batch. Present appeals are in respect of Misc.(A) Case No.379 of 1997 (SN), wherein compensation to the tune of Rs.1,00,000/- has been granted in favour of the claimants with adjustment of Rs.50,000/- already paid under Section 140 of the MV Act on account of death of the deceased in the motor vehicular accident dated 21st May, 1995.

7. MACA No.1071 of 2007 has been filed by the insurer challenging the award and MACA No.670 of 2007 has been filed by the claimants praying for enhancement of the compensation amount.

8. Learned tribunal while granting the award has further granted liberty in favour of the insurer to recover the amount from the owner.

9. While challenging the impugned award, Mr. Das submits that first of all the deceased was a gratuitous passenger in the offending vehicle, i.e. Tipper bearing registration number OR 16 4346, which was a goods carriage vehicle and secondly, the driver of the offending vehicle did not have a valid licence on the date of accident.

10. The claimants prays for enhancement of the amount mainly on the ground that notional income of the minor deceased should be fixed at Rs.15,000/- per annum as per 2nd Schedule of the MV Act.

11. First dealing with the challenge advanced by the insurer that the deceased being a gratuitous passenger the insurer is not liable to indemnify the compensation amount, it needs to be mentioned that in the case of ***M/S. National Insurance Co. Ltd v. Baljit Kaur And Ors., 2004 (2) SCC 1,*** Hon'ble Supreme Court has held as follows:-

> "2**1.** The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in ***Satpal Singh (2000) 1 SCC 237*** . The said decision has been overruled only in ***Asha Rani (2003) 2 SCC 223***. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. xxxxx"

12. In the case of ***Manager, National Insurance Co. Ltd. v. Saju P. Paul & Anr., 2013 (2) SCC 41,*** it is observed that:-

> "26**.** The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in ***Baljit Kaur (2004) 2 SCC 1***

and ***Challa Upendra Rao (2004) 8 SCC 517*** should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 in ***National Insurance Co. Ltd. v. Saju P. Paul, SLP (C) No. 20127 of 2011***, and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in ***Challa Upendra Rao (2004) 8 SCC 517."***

13. Further, our High Court in the case of ***Charulata Mallik vs-Prakash Ku Mohanty, 2016 SCC OnLine Ori 1008***, have held that:-

> “12. It is not only the duly of the Tribunal to see that just and adequate compensation is awarded to the claimants for the loss suffered by the deceased due to the accident, but also to see that there is hassle free payment of compensation with promptitude in order to save the claimants from distress. In that view of the matter, I am persuaded to rely upon the decision of Hon’ble Apex Court in the case of ***Baljit Kaur*** (supra) and ***Saju P. Paul*** (supra) and followed in the decision report in ***2016 (II) OLR 448*** as well as unreported decision in M.A.C.A. No.485 of 2007 (supra).”
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> xxxxxx xxxxx xxxxxx
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> 14. In that view of the matter, the appeal is allowed in part to the extent stated above and the insurance company-respondent no.2 is directed to deposit the compensation awarded along with interest accrued thereon before learned Tribunal within a period of six weeks hence. On such deposit being made, the same shall be disbursed/released in favour of the claimants proportionately in terms of the impugned award on proper identification. The Insurance Company is at liberty to prosecute the owner of the offending vehicle (respondent no.1) to recover the compensation amount taking recourse to law.”

14. In the instant case the deceased is admittedly a minor child and the accident took place in 1995. Therefore, the challenge advanced by

the insurer is not found appealing since the tribunal has granted the right of recovery in favour of the insurer, which is in accordance with the principles enumerated in the aforesaid decisions.

15. Coming to the second point raised by the insurer that the driver did not have a valid driving licence on the date of accident, it is the specific finding of the tribunal that the driver of the offending truck was possessing a fake licence based on Ext.8 and Ext.C. However no evidence was led from the side of the insurer to bring anything that it was within the knowledge of the owner. The insurer has further failed to bring anything on record that the accused driver was not competent to drive the vehicle.

16. In the case of ***National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297*** the Hon'ble Supreme Court has held as follows:-

> "110. (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed

driver or one who was not disqualified to drive at the relevant time."

17. Again in the case of ***Nirmala Kothari vs. United India Insurance Company Limited, (2020) 4 SCC 49*** it is held by Supreme Court that the owner while hiring a driver is though expected to verify that the driver has a driving licence, if the driver produces a licence which on the face of it looks genuine, the employer is not expected to further investigate into the authenticity of the licence unless there is cause to believe otherwise and if the employer finds the driver to be competent to drive the vehicle and has satisfied himself that the driver has a driving licence, then there would be no breach of Section 149(2)(a)(ii) of the MV Act and the insurance company is liable under the policy to indemnify the compensation.

18. Relying on the decision rendered in the case of ***Swaran Singh*** (supra), the Supreme Court further in the case of ***Lal Chand v. Oriental Insurance Co. Ltd., (2006) 7 SCC 318,*** held that the insurer has the onus to prove that the owner of the vehicle was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant point of time.

19. Accordingly the insurer cannot take any benefit for the same to disown its liability.

20. So far the challenge of the claimants is concerned, Ms. Mohanty contends that the deceased being a minor should be treated as a non-earning person and according to the amount prescribed in

Schedule-II of the MV Act, his notional income should be fixed at Rs.15,000/- per annum.

21. Upon perusal of the impugned judgment of the tribunal it is seen that there are altogether 23 children died in the accident as they were in the offending vehicle which was loaded with cow dung manure at the time of accident. The learned tribunal without going through a detailed process of computation, keeping in view the age of the minor children died in the accident, has directed for payment of compensation of Rs.1,00,000/- in every case considering the age group of those deceased children.

22. It is true that as per the 2nd schedule in the MV Act, notional income of a non- earning person is prescribed to be Rs.15,000/- per annum. However, in absence of details of each child brought on record through evidence like age, their educational qualification and other aspects including socio-economic background of the parents, who are present claimants, in the opinion of this court the amount so granted by the Tribunal to the tune of Rs.1,00,000/- uniformly in each case does not require any interference.

23. In the result, both the appeals are disposed of and the award amount granted by the tribunal along with interest is confirmed.

24. At this stage it is submitted by Ms. Mohanty, learned counsel that the claimants have not received the amount of Rs.50,000/- in terms of direction of the tribunal passed under Section 140 of the MV Act and therefore, the entire amount of Rs.1,00,000/- be paid to them.

The learned tribunal is directed to verify the same on record and if found that the claimants have not received the amount granted under Section 140 of the MV Act, then pay the entire amount of Rs.1,00,000/- (one lakh) along with interest to the claimants.

25. Accordingly, the insurance company is directed to deposit the balance amount of Rs.50,000/- (fifty thousand) before the tribunal along with interest @ 6% as directed by it, within a period of two months from today; where-after the same shall be disbursed in favour of claimants on the same terms and proportion as contained in the impugned judgment.

26. The statutory deposit made by the insurer before this court in MACA No.1071 of 2007 along with accrued interest be refunded on proper application and on production of proof of deposit before the tribunal.

27. An urgent certified copy of this order be issued as per rules.

(B.P. Routray)
Judge

M.K.Panda