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IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.69 OF 2019

Bajaj Allianz General Insurance Co. Ltd., 3C-D, Sesa Ghor, 20 Patto Plaza, Panaji-Goa. Through its Authorized signatory, Mr. Nilesh Subhashchandra Gandhi. … Appellant

Versus

1. Smt. Sunita Gangadhar Khubchandani, Wife of Late Gangadhar Khubchandani, Aged 46 years, Housewife, R/o Flat No.S-3, Vaz Apartments, Opp. Sharada Classic, Fatorda, Margao-Goa, 403602.

2.Mr.Jeevandas Gangadhar Khubchandani,
Son of Late Gangadhar Khubchandani,

Aged 25 years, service,
R/o. Flat No.S-3, Vaz Apartments, Opp. Sharada Classic, Fatorda, Margao-Goa, 403602.

3. Mr. Revachand Gangadhar Khubchandani,
Son of Late Gangadhar Khubchandani, Aged 24 years,

R/o Flat No.S-3, Vaz Apartments, Opp. Sharada Classic, Fatorda, Margao-Goa, 403602. |

4. Mr. Narendra Gangadhar Khubchandani,
Son of Late Gangadhar Khubchandani,

Aged 20 years, Student,

R/o Flat No.S-3, Vaz Apartments, Opp. Sharada Classic, Fatorda, Margao-Goa, 403602.

5. Mr. Sidney Pereira,
Son of Sylvestor Pereira,
Age 34 years, Driver,
Resident of Behind Grace Church,
Margao-Goa-403601.

6. Mrs. Maria Pereira,
Daughter of Sylvestor Pereira,
Age 34 years, Driver, Resident of H.No.103/A.B., Behind Grace Church, Margao-Goa-403601. … Respondents

Mr. Amey Kakodkar with Mr. Pankaj Shirodkar, Advocates *for the Appellant.*
Mr. Sudesh Usgaonkar with Ms. R. Pereira, Advocates *for Respondent Nos.1 to 4.*

CORAM: M. S. SONAK, J.

DATE : 8th JULY 2022

ORAL JUDGMENT :

1. Heard Mr. Kakodkar for the Appellant – Insurance Company and Mr. Sudesh Usgaonkar, who appears along with Ms. R. Pereira for respondents nos.1 to 4 – claimants. Respondent nos.5 & 6 have been duly served.

2. This appeal challenges the judgment and award dated 06.10.2016 made by the Motor Accident Claims Tribunal, South

Goa, disposing of Claim Petition No.90/2013 by awarding compensation of ₹28,68,800/- to the claimants along with interest at the rate of 9% per annum from the date of the filing of the petition till full and final payment.

3. Mr. Usgaonkar, learned Counsel for the claimants, at the outset, pointed out that in this case, no leave was obtained under Section 170 of the MV Act and, therefore, the Appellant–Insurance Company cannot maintain this appeal to question the quantum of compensation.

4. The records indeed reveal that no leave was obtained under Section 170 of the MV Act.

5. Mr. Kakodkar, however, submitted that in ***Oriental Insurance Ltd. V/s. Sangita Devi and Ors.***[1]***.*** The Delhi High Court, relying upon the decision of the Hon'ble Supreme Court in ***United India Insurance Co. V/s. Sudha Rani,***[2] has held that once the insurance company is voluntarily impleaded as a party to the claim petition by the claimants, it can raise all defenses, including the defenses concerning the quantum of compensation. He submitted that despite best efforts, he was not in a position to

1 2016 SCC Online Del. 1221

2 Civil Appeal No.8654/2013 decided on 24.09.2013 obtain a copy of the decision of the Hon'ble Supreme Court in ***Sudha Rani*** *(supra).*

6. Mr. Kakodkar also referred to the decision of the Hon'ble Supreme Court in ***Bajaj Allianz General Insurance Co. Ltd. V/s. Kamala Sen***[3] , which according to him, holds that where the insurance company is impleaded as a party respondent, it can raise all contentions that are available to resist the claim. In addition, he pointed out that the Hon'ble Supreme Court held this in the case of ***United India Insurance Company Ltd. V/s. Shila Datta***[4].

7. Mr. Kakodkar, without prejudice, submitted that in this case, there is evidence that respondent no.5 (Driver of the insured vehicle) was driving under the influence of alcohol. He refers to the evidence of Pradeep Velip (RW1), the Head Constable attached to the Maina Curtorim Police Station at the time of the accident. RW1 has produced a blood report from the Directorate of Health Services, Hospicio Hospital, Margao, which certifies that 80 mg of alcohol per 100 ml of blood was detected in the blood sample. He submits that this amounts to a fundamental breach of the insurance policy's terms and conditions; therefore,

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3 2014 ACJ 2396

4 (2011) 10 SCC 509

the Insurance Company should have been absolved of the liability to pay. In the alternate, he submits that a pay and recover order could have been made. He refers to paragraph 19 of the impugned judgment and award to present that the Tribunal had, in fact, intended to make such an order but failed to make such an order in the operative portion.

8. The Division Bench of this Court in ***I.C.I.C.I. Lombard General Insurance Co. Ltd., Amravati V/s. Surekha w/o. Prakash Ghurde and Ors.***[5] has held that an appeal questioning the quantum of compensation will not be maintainable at the behest of the Insurance Company in the absence of leave under Section 170 of the MV Act. The Division Bench may not have referred explicitly to *Sangita Devi* (supra) or the decision of the Hon'ble Supreme Court that was referred to in *Sangita Devi* (supra). However, the Division Bench has considered the decisions of the Hon'ble Supreme Court in ***National Insurance Company Limited V/s. Nicolletta Rohtagi***[6]***, United India Assurance Company Ltd. Vs. Bhushan Sachdev***[7]***, Shila Datta (supra) and Josephine James V/s. United India Insurance Company Limited***[8] and held that notwithstanding the reference

5 (2020) 2 Bom.CR 465

6 (2002) 7 SCC 456

7 (2002) 2 SCC 265

8 (2013) 16 SCC 711

made, the decisions in ***Nicoletta Rohtagi*** *(supra)* and ***Josephine James*** *(supra)* hold good and based upon the same, the appeal filed by the Insurance Company questioning the quantum of the compensation would not be maintainable in the absence of permission under Section 170(b) of the said Act.

9. Therefore, the Appellant–Insurance Company cannot question the quantum of compensation awarded by the Tribunal in this appeal.

10. The Appellant has also not made out a case where it should be completely absolved of the liability to pay the compensation amount. At the highest, a case has been made out to permit the Appellant – Insurance Company to recover this amount from respondent no.5 after payment to the claimants.

11. Section 185 of the MV Act provides that whoever while driving, or attempting to drive, a motor vehicle has, in his blood, alcohol exceeding 30 mg. per 100 ml. of blood detected in a test by a breath analyzer, or is under this influence of a drug to such an extent as to be incapable of exercising proper control over the vehicle, shall be punishable for the terms as indicated in the said section. The Insurance Policy also contains a clause that the

Insurance Company will not be liable if the insured vehicle driver drives under the influence of alcohol.

12. From the evidence of RW1, including, more particularly, the laboratory investigation report produced by him, it does appear that 80 mg. of alcohol was detected from the blood sample of respondent no.5. Such circumstances entitled the Appellant to seek pay and recover order.

13. Accordingly, paragraph 19 of the impugned judgment and award reads thus :

> *"19. It is to be stated that RW1 has stated that he had sent the Driver of the offending vehicle (respondent no.1) for an alcohol test. This witness has produced the report issued by Hospicio Hospital, Margao at exhibit 41. This report shows that 80 mg of alcohol was present in the blood sample of respondent no.1. Even if this is so, the insurance company cannot be absolved from its liability to pay the claimants the compensation.* ***It may, however, recover the compensation from the owner of the said car."***

14. From the above, it does appear that the Tribunal intended to permit the Appellant to recover the compensation amount from the owner of the insured vehicle but omitted this mention in the operative portion. To that extent, the award can be suitably modified without prejudicing the interest of the claimants.

15. Accordingly, this appeal is partly allowed. After paying the awarded compensation to the claimants, the Appellant will be entitled to recover the same from respondents nos.5 & 6 jointly and severally.

16. The claimants are permitted to withdraw the deposited amount **after six weeks** from today unless, in the meanwhile, the Appellant - Insurance Company secures restraint orders for such withdrawal.

17. The claimants will have to produce proper identification documents and furnish bank details so that the Registry can directly deposit the amounts into their respective bank accounts. The claimants will also be entitled to the interest that may have accrued on the deposited amounts after adjusting the amounts if already withdrawn.

18. The appeal is disposed of in the above terms. There shall be no orders for costs.

M. S. SONAK, J.