

13.09.2023
Ct. 654
D/L 187 & 188
ab/kb

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

FMA 252 of 2017
With
CAN 2 of 2017(Old No. CAN 174 of 2017)

Bajaj Allianz General Insurance Co. Ltd.
-Vs-
Omar Faruk & Anr.

With
COT 22 of 2016
Omar Faruk
-Vs-
Bajaj Allianz General Insurance Co. Ltd.

Mr. Rajesh Singh
... for the appellant-Insurance Company

Mr. Saidur Rahaman
... for the respondent no. 1-claimant

Affidavit of service filed by the appellant-insurance company is taken on record.

This appeal is preferred against the judgment and award dated 4th December, 2015 passed by the learned Additional District Judge-cum- Judge, Motor Accident Claims Tribunal, 2nd Court, Tamluk, Purba Medinipur in MAC Case No. 43 of 2011 (Old No. 273 of 2008) granting compensation of Rs. 4,92,300/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 26th April, 2008 at about 7.45 p.m. while the victim and one other were coming from Narghat to Nandakumar side by riding bicycle at that time the offending vehicle bearing registration No. WB-31/3253 (Bus) dashed the victim and his bicycle near Sitalpur bus stoppage, as a result of which the victim fell down on the road and received grievous injuries on his head and multiple fracture on his face, gum, teeth, eye and other parts of the mouth. The victim at first was treated at Khejurberia BPHC and thereafter, was shifted to Purba Medinipur District Hospital and was also treated at Port View Nursing Home Pvt. Ltd. Due to such accident, the victim sustained 60% disablement of his eye sight. On account of injuries sustained and the subsequent disablement, the claimant-injured filed application for compensation of Rs. 5,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

The claimant in order to establish his case examined three witnesses and produced documents, which have been marked as **Exhibits 1 to 11 (series)** respectively.

The appellant-insurance company also adduced the evidence of two witnesses and produced documents, which have been marked as **Exhibits A to F** respectively.

The respondent no. 2-owner of the offending vehicle after service of summons entered appearance before the learned Tribunal but failed to contest the claim application subsequently and the case was disposed of *ex parte* against him. In the present appeal steps were taken for causing service of notice of appeal upon the respondent no. 2-owner of the offending vehicle through Court as well as personally on the address provided in the policy of insurance. The notice sent through Court could not be delivered. Similarly, sealed envelope sent by the learned advocate for the appellant-insurance company to respondent no. 2-owner of the offending vehicle has returned with the endorsement “*left*”. Since the respondent no. 2-owner of the offending vehicle after appearing before learned Tribunal failed to contest the claim application and it is found on repeated steps, service could not be effected, service of notice of appeal upon the said respondent stands dispensed with.

Upon considering the materials on record and the evidence adduced on behalf of the respective parties, the learned Tribunal granted compensation of Rs. 4,92,300/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal,

the insurance company has preferred the present appeal.

Challenging the impugned judgment and award of the learned Tribunal, the claimant has also preferred a cross-objection being **COT 22 of 2016**.

Mr. Saidur Rahaman, learned advocate for the respondent no. 1-claimant at the outset submits that the claimant does not intend to proceed with the cross-objection.

In view of such submission, the cross-objection being **COT 22 of 2016** stands dismissed as withdrawn.

Mr. Rajesh Singh, learned advocate for the appellant-insurance company submits that the premium in respect of the policy of insurance was paid by way of cheque by the owner of the offending vehicle and in anticipation that the said cheque would be honoured, the insurance company issued policy of insurance in respect of the offending vehicle. However, subsequent thereto, upon presentation of the aforesaid cheque by the insurance company before its banker, it was returned with endorsement "*Sufficient fund wanting*", which clearly goes to show that the insurance company actually did not receive any premium for renewal of the policy of insurance and in consequent thereto, no contract came into existence between the insurer and insured and, therefore, the owner of the offending vehicle is not entitled to be indemnified under

the policy of insurance. He fairly submits that the intimation of cancellation of the insurance policy was not effected prior to the accident. However, since the policy stood cancelled due to dishonour of cheque issued towards payment of premium of the policy of insurance, as per settled proposition of law, the insurance company in such circumstances shall be given liberty to recover the amount of compensation to be paid to the claimant-injured. To buttress his contention, he relies on a decision of this Court passed in ***FMA 50 of 2019 (Tata AIG General Insurance Company Limited versus Narayan Pal @ Narayan Paul & Anr.)***.

Mr. Saidur Rahaman, learned advocate for the respondent no. 1-claimant leaves the matter to the discretion of the Court.

Having heard the learned advocates for the respective parties, the only issue that has fallen for consideration is whether the insurance company in event of dishonour of cheque issued towards premium of policy of insurance shall have liberty to recover the compensation paid from the owner of the offending vehicle.

With regard to the aforesaid issue raised by the insurance company, it is found that in its written statement the insurance company has raised the plea that the insurance policy bearing no. OG-08-2410-1812-

00000105 issued for the period commencing from 13.03.2008 to 12.03.2009 was cancelled by the insurance company as the cheque delivered towards payment of premium was returned by the banker on the ground of "*Sufficient fund wanting*". As per the policy conditions, the insurance policy was void *ab initio* in case of dishonour of cheque. In order to substantiate such fact, the insurance company examined one Arkadeep Sarkar, its Legal Executive as OPW1, who also deposed of the aforesaid fact and produced the policy certificate and its cancellation, bank particulars dated 19th November, 2014 regarding dishonour of cheque, letter issued to the owner dated 10th May, 2008 and 12th March, 2009, letter of Manager, Balageria Central Co-operative Bank Ltd. dated 10th April, 2008, terms and conditions of the policy of insurance marked as Exhibits **A, A/1. B, C, C/1, D & E** respectively. Further OPW-2, Debasis Sadhu, Manager-in-Charge, Balageria Central Co-operative Bank Ltd. produced the cheque which was dishonored and is marked as **Exhibit F**. From the evidence adduced on behalf of insurance company it is sufficiently established that the cheque issued towards premium of insurance policy, was dishonored due to "*Sufficient fund wanting*". However, there are no materials on record to suggest that prior to accident the cancellation of policy was intimated to the registered owner of the offending vehicle.

In **Deddappa and Ors. Versus Branch Manager, National Insurance Company Limited** reported in **(2008) 2 SCC 595**, the Hon'ble Supreme Court observed as follows:

“24. We are not oblivious of the distinction between the statutory liability of the insurance company vis-à-vis a third party in the context of Sections 147 and 149 of the Act and its liability in other cases. But the same liability arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

x x x x x

26. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.”

In **United India Insurance Company Limited versus Laxmamma and Other** reported in **(2012) 5 SCC 234**, the Hon'ble Supreme Court observed as follows:

“26. In our view, the legal position is this: where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premiums and such cheque

is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof.

x x x x x

28. In view of the above, the judgment of the High Court impugned in the appeal does not call for any interference. The civil appeal is dismissed. However, the insurer shall be at liberty to prosecute its remedy to recover the amount paid to the claimants from the insured. No order as to costs."

Bearing in mind the aforesaid proposition, as the materials on record is bereft of evidence showing intimation of cancellation of policy of insurance made to the owner of the offending vehicle and duly served but shows of dishonour of cheque issued towards payment of premium of policy of insurance, hence as per settled proposition of law, the insurance company shall satisfy

the award and thereafter recover the same from the owner of the offending vehicle in accordance with law.

It is found that an amount of Rs.7,15,648/- has been deposited vide OD Challan no. 2807 dated 11th January, 2017 in terms of an order of this Court dated 22nd December, 2016 and a statutory amount of Rs.25,000/- has also been deposited vide OD Challan no. 7 dated 1st April, 2016 before the registry of this Court. Both the aforesaid deposits together with accrued interest be released in favour of the respondent no.1-claimant.

The Registrar General, High Court, Calcutta shall release the aforesaid amount together with accrued interest in favour of the respondent no.1-claimant upon satisfaction of his identity.

The appellant-insurance company shall be at liberty to recover the amount of compensation paid from the owner of the offending vehicle in accordance with law.

With the aforesaid observations, the appeal and the cross-objection stand disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent. No order as to costs.

All the connected applications, if any, also stand disposed of.

Interim order, if any, stands disposed of.

Let a copy of this order along with the lower court records be sent down to the learned Tribunal in accordance with rules.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on compliance of necessary formalities.

(**Bivas Pattanayak, J.**)