06.06.2023
Ct. 654
D/L 1 & 2
ab/sn

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURIDICTION
APPELLATE SIDE

FMA 50 of 2019
With
IA No. CAN 1 of 2018(Old No. CAN 9055 of 2018)

Tata AIG General Insurance Company Limited
-Vs-
Narayan Pal @ Narayan Paul & Anr.
With
COT 21 of 2019

Narayan Pal @ Narayan Paul
-Vs-
Tata AIG General Insurance Company Limited

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

Mr. Saidur Rahaman
... for the respondentNo.1-claimant

This appeal is directed against the judgment and award date 13th September, 2018 passed by the learned Additional District Judge-cum- Judge, Motor Accident Claims Tribunal, Islampur, Uttar Dinajpur in MAC Case No. 67 of 2017 granting compensation of Rs. 6,19,022/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 29th May, 2016 at about 9.00 p.m. while the victim was returning on foot from Pichla Bus Stand, at that time the offending vehicle bearing registration No. WB-60-

N/0441 (Bolero) came in a very high speed from Dalkhola side and in rash and negligent manner dashed the victim, as a result of which, the victim sustained multiple injuries and fracture injuries on his right leg. He was medically treated at different hospitals and ultimately his right leg was amputated from below knee and he suffered disablement. On account of injuries sustained and subsequent disablement, the claimant-victim filed application for compensation of Rs.21,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The claimant-injured in order to establish his case examined himself and three other witnesses and also produced documents, which have been marked as **Exhibits 1** to **11** respectively.

The appellant-insurance company also adduced evidence of one witness and produced documents, which have been marked as **Exhibits A** to **D** respectively.

Upon considering the materials on record and the evidence adduced by the respective parties, the learned Tribunal granted compensation of Rs. 6,19,022/- together with interest in favour of the claimant with a direction upon the appellant-insurance company to satisfy the award and granted liberty to the appellant-insurance company to recover the same from the owner of the offending vehicle in accordance with law.

Being aggrieved by and dissatisfied with the impugned judgment and award, the insurance company has preferred the present appeal.

The respondent No. 1-claimant challenging the said award of the learned Tribunal has also filed a cross objection being COT 21 of 2019.

Both the appeal and the cross objection are taken up together for consideration and disposal.

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 vide cheque bearing No. 008015 amounting to Rs.26,428/-, and in anticipation that the aforesaid cheque would be honoured, the insurance company issued the insurance policy in respect of the offending vehicle. However, upon presentation of the aforesaid cheque by the insurance company before its banker, it was returned with endorsement "*funds insufficient*", which clearly goes to show that the insurance company actually did not receive any premium for renewal of the police of insurance from the owner of the offending vehicle and in consequence thereof, in the absence of consideration, no contract came into existence between the insurer and the insured and, therefore, the owner of the offending vehicle is not entitled to be indemnified under the alleged policy of insurance. He further submits that it is settled proposition that once the notice of cancellation of policy is sent to the owner and he has been intimated of such cancellation of the policy of insurance, the insurance company cannot be held liable to indemnify the owner. Furthermore, it is submitted that in the case at hand, the insurance company prior to three months of the accident, in the month of March, 2016, sent intimation to the owner of the offending vehicle through registered post with acknowledgement due informing of cancellation of policy stemming from dishonour of cheque issued towards premium. The factum of dishonour of the cheque issued towards the premium and sending of the notice is not in dispute. Though the acknowledgement of receipt of notice of cancellation is not produced but in view of Section 27 of the General Clauses Act when the consignment is properly addressed, pre-paid and posted by registered post, it is deemed to have been delivered in ordinary course of post and, therefore, when the notice of cancellation has been served upon the owner of the offending vehicle prior to the accident, the insurance company cannot be saddled with liability to compensate. To buttress his aforesaid contentions, he relies on the decision of the Hon'ble Supreme Court passed in ***United India Insurance Co. Ltd. versus Laxmamma and Ors.*** reported in ***AIR 2012 SC 2817*** and decision of the High Court of Kerala passed in

Prasanna versus Kabeer reported in ***AIR 2019 Ker 82***. In the light of his aforesaid submissions, he prays that the insurance company be exonerated from the liability of making payment of the compensation amount.

Mr. Saidur Rahaman, learned advocate for the respondent No. 1-claimant (injured) in reply to the contentions raised on behalf of the appellant-insurance company submits that the insurance company has not produced any document showing service of notice of intimation of cancellation of the insurance policy upon the owner of the offending vehicle, which is a *sine quo non* for exonerating the insurance company in case of dishonour of cheque issued towards premium. He further submits that D.W.1, Kamaljit Ray in his cross-examination has admitted the fact that he has no document to show that the notice of cancellation was actually delivered and acknowledged by the addressee. Such being the position, the insurance company cannot claim to have exoneration of payment of liability.

Despite service of notice of appeal, the respondent No. 2, owner of the offending vehicle is unrepresented.

Having heard the learned advocates for the respective parties, it is found that the insurance company in this appeal has raised a sole ground that since the policy of insurance in respect of the offending vehicle was cancelled prior to the accident due to dishonour of cheque issued towards premium, hence the Insurance Company is not liable to satisfy the award.

With regard to the aforesaid issue raised by the insurance company, it is found that the insurance company in its written statement has categorically stated that the policy of insurance was issued on the basis of premium paid through cheque which was subsequently dishonoured and the information of cancellation of policy was intimated to the registered owner of the offending vehicle prior to the accident and, therefore, the insurance company was not liable to make payment since on the date of accident, the offending vehicle was not insured with the insurance company. In order to establish such fact, the insurance company has examined one Kamaljit Ray, Deputy Manager (Legal) of the Insurance Company, who produced the copy of notice addressed to the owner of the offending vehicle, notice regarding dishonour cheque, postal information slip and copy of intimation letter issued by the Axis Bank, Siliguri Brach, which are marked as **Exhibits B, C, C/1** and **D** respectively. From **Exhibit C-1**, it is found that the registered letter with acknowledgement due bearing No. RM860367010IN was sent to the owner of the offending vehicle. Taking into consideration, documents produced on behalf of the insurance company, the learned Tribunal also held that the notice of cancellation of policy of insurance has been sent to the owner of the offending vehicle.

Mr. Singh, learned advocate for the appellant-insurance company relying on *Prasanna (supra)* has strenuously argued that since the notice of cancellation of policy of insurance has been sent to the owner of the offending vehicle through registered post, pre-paid and properly addressed, the same is to be accepted as good service in view of Section 27 of the General Clauses Act. *Per contra*, Mr. Rahaman, learned advocate for the respondent No. 1-claimant submitted that no such document has come forth showing service of notice of cancellation of policy of insurance upon the owner of the offending vehicle.

Now it is to be examined whether true, effective and actual service intimating the cancellation of the insurance policy to the owner of the offending vehicle is a requirement in case of dishonour of cheque issued towards premium of insurance policy.

The High Court of Kerala in *Prasanna (supra)* has held that production of receipt evidencing the dispatch by registered post raises presumption in favour of the insurer that the intimation has been sent to the addressee for secured delivery and relying on the provisions under Section 27 of the General Clauses Act, 1897, further held that a period of one week from date of dispatch can safely be adopted as the time necessary to serve the letter in the ordinary course after which the intimation is presumed to have been served on the addressee.

In ***Daddappa and Ors. versus Branch Manager, National Insurance Company Limited***, reported in ***2008 A.C.J. 581***, the Hon'ble Supreme Court observed as follows:

> *"26. 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."*

In *Laxmamma (supra)*, the Hon'ble Supreme Court observed as follows:

> *"19. 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 premium and such cheque is returned dishonured, 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. Actg 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."*

The Hon'ble Court in *Laxmamma (supra)* has also dealt with the proposition laid down in *Daddappa (supra)* and went on to observe that the insurance company is to satisfy the award unless the intimation of such cancellation has reached the insured before the accident. Such observation clearly manifest of actual service of intimation of cancellation of policy and not of deemed service. In view of decision of Hon'ble Supreme Court, I most humbly differ from the observation of High Court of Kerala in *Prasanna (supra)*. Thus, from the aforesaid propositions, it manifest that intimation of cancellation of policy is to be communicated to the policy holder, i.e. insured showing actual service. In the case at hand, it is found that the notice of intimation of cancellation of policy was sent through registered post with acknowledgement due, however, the insurance company has not produced the acknowledgement of receipt. D.W.1 has admitted in his cross-examination that there is no document showing that the notice of cancellation of policy of insurance was actually delivered and acknowledged by the addressee. The record does not suggest intimation or communication of cancellation of policy of insurance to have been served upon the owner of the offending vehicle. Accordingly, following the principles laid down by the Hon'ble Supreme Court in *Daddappa (supra)* and *Laxmamma (supra),* I have no manner to interfere with the order of the learned Tribunal directing the insurance company to satisfy the award and thereafter recover the same from the owner of the offending vehicle in accordance with law.

Now, the cross objection of the respondent no.1-claimant is taken up for consideration.

Mr. Shaidur Rahaman, learned advocate for the respondent no.1-claimant submits that at the time of accident, the victim was a Driver by profession, however, the learned Tribunal erred in considering the income of Rs.3,000/- per month whereas it ought to have considered the income of Rs.7,000/- per month. He further submits that the victim is also entitled to an amount equivalent to 40% of his annual income towards future prospect. Moreover, the victim is also entitled to an amount of Rs.3,00,000/- towards pain and sufferings. He fairly submits that multiplier in the present case should be 15 instead of 16 since at the time of accident the victim was 36 years of age.

In reply, Mr. Singh, learned advocate for the appellant-insurance company submits that there is no documentary evidence produced showing the income of the victim to be Rs.7,000/- per month and bearing in mind, the economic factors and the cost of living prevalent at the time of accident the income should be considered at Rs.5,000/- per month. He further submits that the multiplier should be 15 instead of 16.

With regard to the income of the victim, it is found that the learned Tribunal considered the income at the rate of Rs.3,000/- per month. The claimant has stated in his claim application as well as in his evidence that he used to earn Rs.7,000/- per month working as a driver. Save and except the evidence of the victim(PW-I), there are no other supporting evidence, oral or documentary. Bearing in mind, the cost of living and the economic factors prevalent at the time of accident in the year 2016, I am of the view that the income of the victim should be considered at Rs.5,000/- per month.

Since at the time of accident the victim was aged about 36 years and was self-employed following the principles laid down by the Hon'ble Supreme Court in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in ***2017 ACJ 2700***, the victim is entitled to an amount equivalent to 40% of the annual income towards future prospect.

Undisputedly, the victim has undergone amputation of his right leg due to injury sustained in the accident. Bearing in mind the aforesaid, I am inclined to grant Rs.1,00,000/- towards pain and sufferings under the pecuniary damages.

Admittedly, the victim at the time of accident was 36 years of age, following the observations of ***Sarla Verma versus Delhi Transport Corporation Limited & Ors.*** reported in ***2009 ACJ 1298***, the multiplier should be 15 instead of 16.

Bearing in mind the above factors, calculation is made hereunder:

Calculation of Compensation

Monthly Income	Rs. 5,000/-
40% of the future prospect (Rs. 2,000/-)	Rs. 7,000/-
Annual Income (Rs. 7,000 x12)	Rs. 84,000/-
70% disability=70% loss of income	Rs. 58,800/-
Multiplier 15 (Rs. 58,800 x 15)	Rs. 8,82,000/-
Add: Medical expenses	Rs. 1,85,822/-
Add : Non-pecuniary (Pain & suffering)	Rs. 1,00,000/-
Total amount	Rs. 11,67,822/-

Mr. Singh, learned advocate for the insurance company, submits that considering the prevalent rate of banking interest, the interest on the compensation amount should be 6% per annum instead of 7% per annum and he seeks for modification of the award in that regard. I find substance in the submissions made by Mr. Singh, learned advocate for the appellant-insurance company. Considering the prevalent banking interest, I am of the view that the compensation amount should carry interest @ 6% per annum.

Accordingly, the claimant is entitled to compensation of Rs. 11,67,822/- together with interest @ 6% per annum from the date of filing of the claim application till payment.

It is found that the appellant- insurance company has already deposited an amount of Rs.25,000/- before the registry of this Court vide O.D. Challan no. 1785 dated 13.11.2018 and also deposited an amount of Rs.6,19,022/- with the registry of this Court vide O.D. Challan no.2781 dated 06.02.2019. Both the aforesaid deposits together with accrued interest shall be adjusted against the entire compensation amount.

The appellant- insurance company is directed to deposit the balance amount of compensation and the interest indicated hereinabove by way of a cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

The respondent no.1-claimant is directed to deposit *ad valorem* court fees on the compensation assessed, if not already paid.

Upon deposit of the balance amount of compensation as aforesaid and the interest indicated above, the learned Registrar General, High Court, Calcutta shall release the amount in favour of the respondent no.1-claimant, upon satisfaction of his identity and payment of *ad valorem* court fees, if not already paid.

With the aforesaid observations, the appeal and the cross objection stand disposed of. The impugned judgement and award is modified to the above extent. The direction of the learned Tribunal giving liberty to the insurance company to recover the award satisfied from the owner of the offending vehicle is affirmed.

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

Interim order, if any, stands vacated.

Let a copy of this order along with the Lower Court Records be sent to the learned Tribunal for information.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(**Bivas Pattanayak, J**.)