

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 2204 OF 2015

ICICI Lombard General Insurance Company Limited
.....Appellant

Versus

Sekh Mariyam Bibi & Others
.....Respondents

For the Appellant: Mrs Gopa Das Mukherjee, Advocate.

For the Respondent no.1 to 4: Mr Jayanta Kumar Mandal, Advocate.

Heard on: 30.11.2022.

Judgment on: 17.3.2023

Bivas Pattanayak, J :-

1. The present appeal is preferred against the judgment and award dated 15 May 2015 passed by learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Diamond Harbour, 24-Parganas (South) in M.A.C Case no. 54 of 2013 granting compensation in favour of the claimants to the tune of Rs. 52,86,836/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 28 November 2011 at about 13:00 hours while the victim was coming by a van rickshaw from Nagendra Bazar

towards Diamond Harbour and on the way when he reached near Bally More at that time the offending vehicle bearing registration no.WB-41E/5292 (Lorry) which was coming from opposite direction in a high speed and in rash and negligent manner dashed the said van rickshaw, as a result of which the victim sustained multiple injuries on his person. Immediately the local people shifted the victim to Diamond Harbour Sub-Divisional Hospital wherefrom he was referred to Kolkata for better treatment but on the way he died. On account of sudden demise of the deceased victim, the claimants being the wife and sons filed application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs 60,00,000/-together with interest.

3. The appellant-insurance company contested the claim application before the learned tribunal. Since the owner of the offending vehicle did not contest the claim application before the learned tribunal the claim application was disposed of *exparte* against her.

4. The claimants in order to prove their case examined two witnesses including claimant no.2, son of the deceased and also produced number of documents which have been marked as **Exhibit 1 to 14** respectively.

5. The contesting opposite party no.2-insurance company (appellant herein) also adduced evidence of one witness and proved documents marked as **Exhibit A to G** respectively.

6. Upon considering the materials on record as well as the evidence produced on behalf of the respective parties, the learned tribunal granted compensation of Rs. 52,36,836/- alongwith interest in favour of the respondents-claimants under Section 166 of the Motor Vehicles Act, 1988.

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

8. Mrs Gopa Das Mukherjee, learned advocate for appellant-insurance company submitted that for renewal of policy of insurance respondent no.5-owner of the offending vehicle delivered a cheque bearing no.911111 dated 20.12.2010 on account of premium 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 on 22.1.2011 by the insurance company before its banker, it was returned being dishonoured due to insufficient funds which goes to show that the insurance company actually did not receive any premium for renewal of policy 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 (respondent no.5) is not entitled to be indemnified under the alleged policy of insurance. The insurance company subsequent thereto has also sent notice to the owner of the offending vehicle on 30.1.2011

intimidating cancellation of policy of insurance. In support of such fact the insurance company has discharged its burden during proceeding before the learned tribunal by examining one witness namely Priyamvada Roy, Specialist in legal claims (official of insurance company) and proved documents namely the cover note dated 20.12.2010, cheque bearing no. 911111 dated 20.12.2010, certificate of insurance, cheque return memo dated 22.1.2011 and policy information which clearly indicates that the owner of the offending vehicle (respondent no.5) failed to pay the premium in consequence whereof the policy of insurance was cancelled by the insurance company. Thus, where the contract of insurance is cancelled and the insured have been intimated of such cancellation, the insurance company would not be liable to satisfy the claim. In support of her contention she relied on the decision of Hon'ble Supreme Court passed in ***Daddappa and Others versus Branch, Manager, National Insurance Co. Ltd.*** reported in ***2008 ACJ 581***.

She further submitted that on the relevant date of accident the driver of the offending vehicle did not possess effective and valid driving licence to drive such vehicle which is evident from letter of 'no objection' for return of vehicle to its registered owner **(Exhibit G)** issued by the investigating authority as well as the charge sheet showing submission of PR no. 913/11 dated 29.12.2011 under Section 3/181 of Motor Vehicles Act, 1988 and once the aforesaid defence is established by the insurance company the court or the tribunal cannot direct the insurance company to pay the awarded sum to the

claimant and in support of her contention she relied on the decision of Hon'ble Supreme Court passed in ***National Insurance Co. Ltd versus Swaran Singh and Others*** reported in ***(2004) 3 SCC 297***.

Moreover, she submitted that the learned tribunal erred in considering the income tax returns for determining the income of the deceased-victim which were never proved by cogent evidence and thus such findings of the learned tribunal requires to be set aside being improper and bad in law.

In the light of her aforesaid submissions, she prayed for setting aside the impugned judgment and award of the learned tribunal.

9. In reply to the contentions raised on behalf of the appellant-insurance company, Mr Jayanta Kumar Mandal, learned advocate for respondents-claimants submitted that though the insurance company produced letter of intimation dated 30.1.2011 of cancellation of policy of insurance but it failed to produce the postal receipts or acknowledgement due card to show that such notice intimating cancellation of policy of insurance was duly communicated to the policy-holder prior to the accident which is a necessary requirement in the defence plea of dishonour of cheque issued towards premium for renewal of policy of insurance. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***National Insurance Co. Ltd versus Balkar Ram and Others*** reported in ***2014 (2) T.A.C 11 (SC)***. He also placed his reliance on ***Daddappa (supra)*** as well as

another decision of Hon'ble Supreme Court passed in ***National Insurance Co. Ltd versus Yellamma and Ors*** reported in **(2008) 7 SCC 526** in this regard. Further since the insurance company has issued policy of insurance upon receipt of cheque towards premium in contravention of provisions of Section 64-VB of the Insurance Act, hence is responsible for its own predicament and in such event public interest would prevail over the interest of the insurance company and in support of his contention he relied on the decision of this court passed in ***Madhabi Maity versus United India Insurance Co. Ltd. and Ors*** reported in **MANU/WB/0372/2009**. Moreover, he submitted that the liability of insurance company subserves a constitutional goal namely social justice and therefore a contract of insurance, covering a third-party risk must be viewed differently *vis-a-vis* a contract of insurance *qua* contract and in support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***National Insurance Co. Ltd versus Abhaysing Pratapsing Waghela and Ors*** reported in **(2008) 9 SCC 133**.

He further submitted that the insurance company has neither made out any specific defence that the driver of the offending vehicle on the relevant date was not holding effective driving licence nor led any cogent evidence to establish the aforesaid fact. The witness examined on behalf of insurance company namely OPW1 also did not state during her examination that the driver of the offending vehicle on the relevant date of accident was not holding

effective driving licence. Therefore in the absence of specific plea and cogent evidence with regard to driver of the offending vehicle not having effective driving licence on the relevant date of accident the argument advanced in this regard is not tenable. Referring to the decision of Hon'ble Supreme Court passed in **Swaran Singh's Case (supra)** he submitted that in order 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 policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time. Moreover, even if, for the sake of argument, it is accepted that the driver of the offending vehicle was not holding effective driving licence on the date of accident in that event as well, the insurance company is to satisfy the award and thereafter recover the same from the owner and the driver. He placed reliance on the decision of Hon'ble Supreme Court passed in **Swaran Singh's Case (supra)** and **Amrit Paul Singh & Anr versus TATA AIG General Insurance Company Ltd & Ors** reported in **2018 SAR (Civil) 768**.

In view of his aforesaid submissions, he prayed for dismissal of the appeal.

10. Despite service of notice of appeal none appeared for respondent no.5-owner of the offending vehicle.

11. Having heard the learned advocates for the respective parties, it is found that the insurance company in this appeal assailed the impugned order on

threefold grounds, *firstly*, 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; *secondly*, since the driver of the offending vehicle did not have effective and valid driving licence to drive such vehicle on the relevant date of accident, the insurance company cannot be saddled with the liability to compensate; and *lastly* the learned tribunal erred in determining the income on the basis of income tax returns of the deceased victim.

11.1. With regard to the first issue that the insurance company is not liable to satisfy the award since due to dishonour of cheque issued towards premium, the policy of insurance was cancelled prior to the accident, it is found that the learned tribunal disapproved such contention on the ground that the insurance company has failed to prove that the notice of cancellation of insurance policy was served upon the insured i.e owner of the offending vehicle. The insurance company in its written statement contended that initially insurance policy was issued by the company however due to dishonour of cheque issued towards premium and failure on the part of owner of the offending vehicle to make any alternative payment towards premium, the policy of insurance was cancelled prior to the date of accident and such fact was duly intimated to the owner of the offending vehicle. Further as per Rule 4 of Insurance Regulatory and Development Authority (Manner of Receipt of Premium) Regulations, 2002, if the consideration

(Premium) towards insurance is not realised by the insurer, the policy shall be treated as void *ab initio*. The insurance company in order to establish such fact adduced the evidence of one Priyamvada Roy, Specialist in legal claims of insurance company, as OPW1 who in her oral evidence also deposed of the aforesaid facts and produced documents namely Motor Vehicle Insurance Proposal and Cover note **(Exhibit B)**, Cheque bearing no. 911111 dated 20.12.2010 of Axis Bank Ltd **(Exhibit C)**, Certificate of Insurance and Schedule **(Exhibit D)**, Cheque return memo dated 22.1.2011 **(Exhibit E)** and policy information **(Exhibit F)** respectively. Mrs Mukherjee, learned advocate for appellant-insurance company has strenuously argued that since notice of cancellation of insurance policy due to dishonour of cheque has been sent to the owner of the vehicle hence as per settled proposition of law the insurance company has got no liability to compensate. *Per contra* Mr Mandal, learned advocate for respondents-claimants have argued that it is *sine qua non* that the notice of cancellation should be served upon the insured before absolving the insurance company from making compensation. In order appreciate the issue raised by insurance company it would be profitable to refer to the following factual aspect.

- (i) The insured i.e owner of the offending vehicle delivered a cheque **(Exhibit C)** towards premium of the insurance policy on 20.12.2010.

(ii) The insurance company issued Motor Vehicle Insurance Proposal and Cover note **(Exhibit B)** in respect of the offending vehicle on 20.12.2010.

(iii) The Certificate of Insurance and Schedule **(Exhibit D)** issued on 20.12.2010.

(iv) The cheque return memo **(Exhibit E)** shows that the cheque delivered towards premium of the insurance policy was dishonoured due to insufficient funds on 22.1.2011.

(v) The policy information **(Exhibit F)** shows that the letter of intimation of cancellation of the instant policy was issued on 30.1.2011.

In **Daddappa's Case (supra)** 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-a-vis a third-party in the context of sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities 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.”

Similar proposition is also reiterated in **Yellamma's Case (supra)** by the Hon'ble court. The decision of Hon'ble court in **Balkar Ram's Case (supra)**

also fortifies the proposition that the intimation of cancellation of policy is to be communicated to the policy-holder i.e the insured. Thus, in view of the aforesaid decisions of the Hon'ble court it is clear that the cancellation of the contract of insurance has to be intimated to all concerned including the policy holder. At this juncture the pertinent question which requires to be dealt with is whether the notice intimating cancellation of insurance policy **(Exhibit F)** was served upon the owner of the offending vehicle or not. Although the policy information **(Exhibit F)** shows issuance of the same on 30.1.2011 but there is no iota of evidence namely postal acknowledgement or track consignment report etc showing intimation thereabout served to the insured-owner of the offending vehicle communicating thereby the information of cancellation of policy of insurance. Further OPW1 in cross-examination admitted that she has got no postal document in respect of communication of cancellation of policy of insurance to insured, Sakila Begum (respondent no.5-owner of the vehicle). Thus from the available materials on record it is manifest that the notice of intimation of cancellation of policy of insurance was not served upon the insured-owner of the offending vehicle. Moreover, Section 64-VB of the Insurance Act mandates that before a contract of insurance comes into being, the premium should be received by the insurer in advance and relevant provision is reproduced hereunder for convenience of appreciation.

“Section 64-VB- No risk to be assumed unless premium is received in advance-

(1)No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside the India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed, is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation -Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is booked or the cheque is posted, as the case may be.....”

The aforesaid provision, therefore, in no unmistakable term provides for issuance of a valid policy only on receipt of payment of the premium. The Hon’ble Supreme Court in ***Oriental Insurance Co. Ltd versus Inderjit Kaur*** reported in ***1998 ACJ 123 (SC)*** as a general proposition stated that it was the insurance company itself, who was responsible for its predicament it had

suffered. The insurance company had issued the policy of insurance upon receipt of a cheque towards the premium in contravention of the provisions of Section 64-VB of the Insurance Act and, therefore, the public interest that policy of insurance serves must clearly prevail over the interest of the insurance company. Following the aforesaid observation of the Hon'ble court, this Court in ***Madhabi Maity's Case (supra)*** observed as follows.

“16. Therefore, the long and short of the principles laid down by the Supreme Court in all those decisions is that if the insurance company at its risk issues a cover note, which is equivalent to the issue of policy without ascertaining whether the cheque itself taken from the insured as a consideration of insurance would be ultimately honoured or not, it would be its liability to make payment of compensation, if any accident occurs before insurance company communicates its decision of cancellation of the policy to the insured.”

Bearing in mind the aforesaid observations of Hon'ble Supreme Court as well as of this Court since the insurance company upon receipt of the cheque issued policy of insurance to cover the offending vehicle without ascertaining whether the cheque delivered towards premium would be ultimately honoured or not and at the same time the insurance company having failed to communicate its decision of cancellation of policy of insurance to the

insured prior to the accident, insurance company is liable to make payment of compensation. I am in consonance with the submissions advanced on behalf of respondents-claimants relying on the decision of Hon'ble Court in ***Abhaysing Pratapsing Waghela's Case (supra)*** that a contract of insurance covering a third-party risk must be viewed differently *vis-a-vis* a contract of insurance *qua* contract. In view of the above discussion, the argument advanced by learned advocate for appellant-insurance company does not hold good.

11.2. With regard to the second issue that the driver of the offending vehicle on the relevant date was not holding effective and valid license, it is found that the insurance company in its written statement has specifically pleaded that at the material time of the alleged accident the said vehicle was not being driven by a qualified person holding a valid and effective driving licence. However, it is relevant to note that no evidence, oral or documentary, has been led by the insurance company in support of such plea. The witness OPW1 examined on behalf of the insurance company also did not depose that the driver of the offending vehicle on the relevant date was not holding valid and effective driving licence. Mrs Mukherjee, learned advocate referring to the charge sheet **(Exhibit 3)** and letter dated 29.12.2011 of the investigating officer **(Exhibit G)** argued that from such documents it is palpably clear that the driver of the offending vehicle on the relevant date was not holding effective and valid driving licence. Although as per charge sheet **(Exhibit 3)**

and the letter of the investigating officer **(Exhibit G)** PR being no. 913 of 2011 was submitted against the driver under Section 3/181 of the Motor Vehicles Act for driving without driving licence yet those are not substantive evidence. Neither the investigating officer nor any officer of the licensing authority has been examined by the insurance company to clarify whether on the relevant date the driver of the offending vehicle was holding valid and effective license or not. The letter of the investigating officer dated 29.12.2011 **(Exhibit G)** was produced by OPW 1 on recall on 12.2.2015, however, the witness on recall also did not state that on the relevant date the driver was not holding valid and effective driving licence. At this stage, it will be profitable to refer to the observation of Hon'ble Supreme Court at paragraph 110 in **Swaran Singh's Case (supra)** as hereunder.

“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 the vehicles

by a duly licensed driver or one who was not disqualified to drive at the relevant time.”

Bearing in mind the aforesaid observation of the Hon’ble court as the insurance company has failed to produce any cogent, substantive evidence to establish the fact that on the relevant date the driver of the offending vehicle was not holding effective and valid driving licence, it cannot take such defence that there was breach of policy condition. Though Mr Mandal, learned advocate for respondents-claimants relying on the decision of **Swaran Singh’s Case (supra)** and **Amrit Paul Singh’s Case (supra)** argued that even if it is found that the driver was not holding effective and valid driving licence, the insurance company can be directed to satisfy the award and thereafter recover from the owner and the driver yet such principle of pay and recovery is not applicable in the facts of the case since it is found that the insurance company has failed to establish by cogent evidence that on the relevant date the driver of the offending vehicle was not holding effective and valid driving licence. Hence, the argument of appellant-insurance company in this regard does not stand to reason.

11.3. With regard to the determination of income of the deceased-victim, it is found that the learned tribunal has considered the income of the deceased-victim for three assessment years i.e 2009-10, 2010-11 and 2011-12. Mrs Mukherjee, learned advocate for appellant-insurance company strenuously argued that since those income tax returns have not been proved in

accordance with law hence those need not be accepted for determining the income of the deceased-victim. The aforesaid income tax returns have been produced by PW1, Mujibul Sekh, son of the deceased-victim, and those has been marked as **Exhibit 8 to 8/2** respectively. There are no materials on record to suggest that those documents are manufactured or false. Those income tax returns have also not been discredited. The claimants also produced the trade license of the deceased-victim in support of his profession marked **Exhibit 9**. Now it is to be seen whether income tax returns can form the basis for determination of the income of the deceased. At this stage it will be profitable to refer to the decision of Hon'ble Supreme Court passed in ***Kalpanaraj versus Tamil Nadu State Transport Corporation*** reported in ***(2015) 2 SCC 764*** where the only available documentary evidence on record of the monthly income of the deceased was the income tax return filed by with Income Tax Department and the Hon'ble Supreme Court in such circumstances held that the High Court was correct to determine the monthly income on the basis of income tax return. Further, the Hon'ble Supreme Court in ***Malarvizhi and others versus United India Insurance Company Limited and Another*** reported in ***(2020) 4 SCC 228*** endorsed the finding of the High Court that the determination must proceed on the basis of income tax return, where available. The income tax return is statutory document on which reliance may be placed to determine the annual income of the deceased. From the aforesaid observation of the Hon'ble court it goes without

saying that the income tax return being the statutory document should be relied upon for determining the income of the deceased even though it is the only available documentary evidence. In ***Sangita Arya versus Oriental Insurance Company Limited*** reported in ***(2020) 5 SCC 327*** the Hon'ble Supreme Court considered the income tax return for assessment years filed prior to the death of the deceased for determining the income of the deceased victim. Bearing in mind the aforesaid observation and the available materials it is found that there is no impropriety in considering the income tax returns of the deceased-victim, filed prior to his death, by the learned tribunal in determining his income. Accordingly the argument advanced on behalf of the insurance company in this regard falls short of merit.

12. In view of the above discussion, the appeal stands dismissed. The impugned judgment and award of the learned tribunal is affirmed. No order as to cost.

13. It is found that the appellant-insurance company has made statutory deposit of Rs. 25,000/- vide OD challan no. 491 dated 2.6.2015 and also in terms of order dated 2nd July 2015 has deposited a sum of Rs.59,97,648/- vide OD challan no. 989 dated 16.7.2015 with the Registry of this Court. Accordingly both the aforesaid deposits along with accrued interest be released in favour of the claimants. Learned Registrar General, High Court,

Calcutta shall release the said amount along with accrued interest in favour of respondents-claimants in equal proportion on satisfaction of their identity.

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

15. Interim order, if any, stand vacated.

16. Let a copy of this judgment alongwith lower court records be forwarded to learned tribunal for information.

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

(Bivas Pattanayak,J.)