IN THE HIGH COURT, AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 1531 OF 2017

CAN 1 OF 2017 (Old no. CAN 7104 of 2017)

Bajaj Allianz General Insurance Company Limited
..........Appellants

Versus

Rina Mondal and Others

...............Respondents

For the Appellant: Mr Rajesh Singh, Advocate.

For the Respondent nos.1 to 3: Mr Laltumohan Ghosh, Advocate.

Heard on: 18.11.2022, 29.11.2022, 20.12.2022.

Judgment on: 10.4.2023.

Bivas Pattanayak, J :-

1.This appeal is preferred against the judgment and award dated 12 April 2017 passed by learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, Fast Track, 1st court, Basirhat, 24-Parganas (North) in M.A.C Case no.20 of 2017 granting compensation of Rs.18,57,500/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 3 August 2012 at about 15:30 hours while the victim and his friend were proceeding towards Kholapota on a motorcycle bearing registration no. WB-26Q/0548 for their official work, at that time the offending vehicle bearing registration no. WB-41E/5888 (lorry) in a high-speed and in the rash and negligent manner dashed the motorcycle, as a result of which the victim and his friend fell down on the road and sustained severe injuries. Immediately, the local people shifted both of the injured persons to Basirhat S.D Hospital for treatment, where the friend of the victim namely Nirmal Biswas died and the victim subsequently succumbed to his injuries on the way to hospital at Kolkata. On account of sudden demise of the victim, the widow, son and mother of the deceased filed application for compensation of Rs.16,50,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

3. The claimants in order to establish their case examined three witnesses and produced documents which have been marked as **Exhibits 1 to 9 (series)** respectively.

4. Appellant-insurance company also adduced the evidence of three witnesses and produced documents which have been marked as **Exhibit A to H** respectively.

5. The appellant-insurance company contested the claim application. However, the owner of the offending vehicle despite service of notice, did not contest the claim application before the learned tribunal and the case was disposed of *exparte* against him.

6. Upon considering the materials on record and the evidence adduced on behalf of the respective parties, the learned tribunal granted compensation of Rs.18,57,500/-together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

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

8. Mr Rajesh Singh, learned advocate for appellant-insurance company submitted that the insurance company through its pleadings and evidence, both oral and documentary, established its defence that on the relevant date of accident the driver of the offending lorry did not hold valid and effective driving license to drive such vehicle which is a heavy motor vehicle, which amounted to breach of terms and conditions of policy of insurance and thus the insurance company cannot be saddled with the liability of making payment of the compensation amount. Furthermore, he submitted that as per the settled position of law laid down by the Hon'ble Supreme Court in its decision passed in ***National Insurance Company Limited versus Swaran Singh and Others*** reported in ***AIR 2004 SC 1531*** as well as subsequent decision in ***Shamanna and Another versus Divisional Manager, Oriental Insurance Company Limited and Others*** reported in ***2018 (3) T.A.C 677 (SC)*** in the event of violation of policy of insurance the principle of pay and recovery is to be applied.

He further submitted that since at the time of accident the deceased was aged 43 years hence the multiplier of 14 instead of 15 should be adopted.

Furthermore, it is submitted that the learned tribunal erred in imposing penal interest at the rate of 10% per annum on the awarded amount which is beyond the scope of provisions of the statute and since the insurance company has already deposited the awarded sum together with interest in terms of order of this Court, the said direction of the learned tribunal imposing penal interest should be set aside.

In the light of his aforesaid submissions, he prays for modification of the award.

9. Mr Laltu Mohan Ghosh, learned advocate for respondents-claimants submitted that where there is breach of terms and conditions of insurance policy, the principles of pay and recovery may be applied in such situations. He also submitted for applying principles laid down ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in ***2017 ACJ 2700*** for entitlement of the claimants towards future prospect and general damages in computation of compensation amount.

9.1. In his usual fairness, Mr Singh, learned advocate for appellant-insurance company also concurs that for computation of compensation the principles laid down by Hon'ble Supreme Court in *Pranay Sethi's case* is to be followed so far as future prospect and general damages are concerned.

10. In spite of service of notice, respondent no.4-owner of the offending vehicle is unrepresented.

11. Having heard the learned advocates for the respective parties, it is found that the insurance company in the present appeal has precisely raised three-fold issues, *firstly,* that since the driver of the offending vehicle on the relevant date of accident was not holding valid and effective driving licence to drive such vehicle hence the insurance company is not liable to make payment of compensation; *secondly,* the multiplier should be 14 instead of 15; and *lastly* that the learned tribunal erred in imposing penal interest at the rate of 10% per annum on the amount of compensation.

12. With regard to the first issue relating to the aspect that the driver of the offending vehicle was not holding effective and valid licence to drive such vehicle on the relevant date of accident, it is found that the insurance company in its written statement has taken specific plea that the driver of the offending vehicle on the relevant date was not holding a valid and effective driving licence to drive amounting to breach of terms and conditions of policy of insurance. In order to establish such fact, the insurance company examined one Debasis Majumdar, UD clerk, Motor Vehicles Department, Barasat as DW1 and one Sanjib Kumar Paik, Motor Vehicles Inspector, Technical at Barasat Regional R.T Office as DW2. During the course of investigation, the investigating agency seized the driving licence of the driver of the offending vehicle namely Mahibul Mondal being licence no. 2520030147916 under seizure list dated 13.8.2012 **(Exhibit 3)**. DW1, in his evidence deposed that the said licence was issued on 12.4.2003 and was valid for non-transport vehicle till 11.4.2023 and for transport vehicle till 16.8.2015. However, the said licence was not valid during the period commencing from 12.4.2012 till

16.8.2012 for the purpose of both transport and non-transport vehicle. This witness produced computerised information of the licence in the name of Mahibul Mondal, driver of the offending vehicle being licence no. 2520030147916 collectively marked as **Exhibit B**. Upon perusal of such computerised information, **Exhibit B**, it is found that the licence was valid throughout the period except from 12.4.2012 till 16.8.2012. DW2, also corroborated the evidence of DW1 in this regard and further deposed that the driver of the said vehicle was not authorised to drive heavy goods vehicle during the aforesaid period from 12.4.2012 till 16.8.2012. Thus, from the aforesaid oral and documentary evidence produced on behalf of the insurance company it manifests that on the date of accident i.e on 3 August 2012 the driver of the offending vehicle did not have valid and effective driving licence to drive such vehicle. Now it is to be seen as to what would be consequence of such breach. It is found that the learned tribunal has not dealt with this aspect. In *Swaran Singh's Case (supra)* the Hon'ble Supreme Court held that where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149 (2) read with sub-section (7), the tribunal can direct that the insurer is liable to be re-imbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Further in a subsequent decision in *Shamanna's Case (supra)* the Hon'ble Supreme Court endorsed the order for pay and recovery passed by the tribunal. Thus, it goes without saying that since on the date of accident the driver of the offending vehicle was not holding valid licence to drive such vehicle the principles of pay and recovery squarely applies to the facts and circumstances of this case. I find substance in the submissions of Mr Singh, learned advocate for appellant insurance company in this regard.

13. With regard to the second issue relating to multiplier, it is found that the learned tribunal applied multiplier of 15 for computing the compensation amount. Save and except the post-mortem report, there are no other documents produced by the claimants in support of age of the deceased-victim. The claimants have asserted that at the time of accident the deceased-victim was aged 43 years. Similar age appears in the post-mortem report **(Exhibit 5)**. Such age appearing in the post-mortem report has not been disputed by either of the parties. In view of decision of Hon'ble Supreme Court passed in ***Sarla Verma and Others versus Delhi Transport Corporation and another*** reported in ***2009 ACJ 1298*** since at the time of accident the deceased was 43 of age, a multiplier of 14 should be adopted instead of 15.

14. So far as the imposition of penal interest at the rate of 10% per annum on the compensation amount is concerned, since the insurance company in compliance to order of this Court dated 16 November 2017 has already deposited an amount of Rs. 24,58,569/-, hence the penal interest imposed by the learned tribunal as above is set aside.

15. Since Mr Singh, learned advocate for appellant-insurance company has conceded for applying principles as laid down by Hon'ble Supreme Court in *Pranay Sethi's Case (supra)* so far entitlement of claimants towards future prospect and general damages is concerned, hence, bearing in mind the above, the claimants are entitled to future prospect and general damages. The claimants are entitled to an amount equivalent to 30% of annual income of the deceased towards future prospect, since the deceased at the time of death was 43 years of age and was in permanent employment and general damages of Rs.70,000/-. In view of the above, the compensation amount is calculated as hereunder.

<u>Calculation of compensation</u>

Monthly Income...Rs.15,400/-
Annual Income...... (Rs.15,400/- X 12) ....Rs. 1,84,800/-
Add: 30% of annual income of the deceased towards
Future prospect...<u>Rs.55,440/-</u>
Annual Loss of income Rs.2,40,240/-
Less: Deduction 1/3rd of the Annual Income
towards personal and living expense.................<u>Rs.80,080/-</u>
Rs.1,60,160/-
Adopting multiplier 14 (Rs1,60,160/- X 14) Rs.22,42,240/-
Add: General Damages..<u>Rs.70,000/-</u>
Loss of Estate................Rs.15,000/-
Loss of Consortium........Rs.40,000/-
Funeral Expenses.........Rs.15,000/-
Total Compensation..........................**Rs.23,12,240/-**

16. Thus, the total compensation comes to Rs. 23,12,240/-. It is found that the insurance company has deposited statutory amount of Rs.25,000/- vide OD challan no. 824 dated 1.7.2017 as well as an amount of Rs. 24,58,569/- vide OD challan no. 2210 dated 6,12.2017. Accordingly, respondent nos. 1, 2 & 3- claimants are entitled to receive the aforesaid amounts together with accrued interest.

17. The learned tribunal granted compensation of Rs. 18,57,500/- together with interest. Accordingly, appellant-insurance company is directed to deposit the balance amount of compensation of Rs. 4,54,740/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit by way of cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

18. Respondents-claimants are directed to deposit *ad valorem* court fees on the amount of compensation assessed, if not already paid.

19. Upon deposit of the aforesaid balance amount of compensation, learned Registrar General, High Court, Calcutta shall release the compensation amount already deposited together with accrued interest and the balance amount with interest as indicated above in favour of the respondent nos.1, 2 & 3-claimants, after making payment of Rs. 40,000/- in favour of respondent no.1-widow of the deceased towards spousal consortium, in following proportions namely respondent no.1-widow of the deceased shall receive ½ of the compensation amount and respondent no.2-son of the deceased and respondent no.3-mother of the deceased shall receive ¼ each, on satisfaction of their identity and payment of *ad valorem* court fees on the amount of compensation assessed, if not already paid.

20. The appellant-insurance company is granted liberty to recover the amount of compensation directed to be paid from the owner and the driver of the offending vehicle in accordance with law.

21. With the aforesaid observation, the appeal stands disposed of. The impugned judgment and award of the learned tribunal stands modified to the above extent. No order as to cost.

22. All connected application, if any, stands disposed of.

23. Interim orders, if any, stands disposed of.

24. Let a copy of this order alongwith lower court records be transmitted to the learned tribunal for information.

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

(Bivas Pattanayak, J.)