08.09.2023
SL No.8
Court No. 551
Ali

IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction

FMA 2878 of 2013

Nitu Mitra & Anr.
Vs.
The Manager, Bajaj Allianz
General Insurance Co. Ltd. & Anr.

Mr. Saidur Rahaman
...for the appellants.

Mr. Indradip Das
.....for the insurance Co.

The instant appeal is preferred against the judgment and award dated 28th of June, 2013 passed by the learned Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Malda in MAC Case No. 240 of 2012.

The brief fact of the case is that the present appellants being the claimants file one application before the learned tribunal under Section 166 of the M.V. Act for getting compensation on the ground that the husband of the appellant No. 1 was died in a road traffic accident due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the insurance company.

The owner of the offending vehicle i.e. the motorcycle initially contested the matter by filing written statement thereafter he did not turn up.

The insurance company has contested the claim case by filing written statement.

The learned tribunal has received the evidences both oral and documentary, also heard the argument from both sides. After hearing both the parties the learned tribunal has awarded a sum of Rs.3,69,500/- in favour of the claimants.

Being aggrieved by and dissatisfied with the said impugned award of compensation, the present appeal was preferred.

Learned advocate for the appellants submits that the learned tribunal has not considered the actual income of the deceased and passed the compensation fixing the income of the deceased notionally to be Rs. 3,000/- per month. The deceased had a “Stationary shop and Xerox business” wherefrom he used to earn Rs. 4,500/-. The oral evidences were given before the learned tribunal by the claimant Nos. 1 and 2 to that effect but it was not considered. So, he prayed that the compensation should be awarded fixing the monthly income of the deceased Rs. 4,500/-. He also argued that the observation of the Hon’ble Supreme Court passed in **Pranay Sethi** has guided that in all cases filed under Section 166 of the M.V. Act including the pending appeals and review applications the future prospects and the general damages has to be given. In this case, the future prospects and the general damages were not awarded to the claimants so that amount must be awarded. He also argued that the learned tribunal has erroneously directed the owner of the vehicle to pay the compensation instead of the fact that the insurance company has contested the matter. He argued that by virtue of the decision of the Hon'ble Apex court passed in **Swaran Singh** as well the **Amrit Paul Singh and another**. The insurance company must have taken the liability to pay the compensations and they are at liberty to recover the same from the owner of the offending vehicle. He further argued that the "principle of pay and recovery" has been adopted by the Apex Court in several occasions by virtue of the decision of the Hon'ble Supreme Court in **Swaran Singh**. Finally, he argued that in this case the award passed by the learned tribunal need be modified and the insurance company may be directed to pay the compensation.

Learned advocate appearing on behalf of the insurance company submits that the learned tribunal has considered the pleadings of the claimants regarding his income of Rs. 4,500/- and on perusing the evidences on record, learned tribunal has correctly came to a conclusions that the income of the deceased should be taken notionally. It is the observation of the learned tribunal that no documentary evidences were produced by the claimants to prove the actual income of the deceased thus the observation of the learned tribunal regarding the notional income the deceased is not perverse.

He further argued that in this particular case, it would be revealed that the facts and circumstances and the manner of accident is totally different to that of the cases before the Hon'ble Apex Court in **Swaran Singh and Amrit Paul Singh**. He argued that in this case the offending vehicle was actually covered under the policy of the insurance company. The insurance policy was not covered for hire or reward purpose. But from the police papers specifically from the seizure list it would be revealed that the person committed the accident is a separate person and not the owner. The person who commits the accident is not the person in favour of whom the authorization letter was issued by the owner. He argued that the policy condition was not only utterly violated in this case but also the policy condition was not actually adhered to its spirit. The argument of the learned advocate for the insurance company is very specific to the effect that in this case the insurance company cannot become take liability of several persons with whom, the insurance company is not legally entered into an agreement. Thus for utter violation of the agreement the owner may be directed to pay the compensation. He further argued that the observation of the learned tribunal to that effect suffers no illegality. The owners of the offending vehicle have only the liability to pay the compensation.

He again argued that the observation of the Hon'ble Apex Court in the "principle of pay and recovery" must have to be strictly followed as enumerated by the Hon'ble Apex Court in **Challa Bharathamma**. He argued that it has been observed by the Hon'ble Supreme Court in **Challa Bharathamma** that before payment the security deposit has to be made before the learned tribunal by the owner. After depositing such security money the insurance company may be ordered to pay the claimants regarding the compensation whatever may be passed by the learned tribunal or by this court.

Heard the learned advocate perused the materials on record also perused the observation of the learned tribunal in respect of the monthly income of the deceased. It appears to me that the learned tribunal had nothing to depend upon the income of the deceased. Thus, he assessed the income of the deceased to be Rs.3,000/- per month notionally. I find no illegality on such fixation of the monthly income of the deceased. It is true that the claimants are the fateful wife and the minor daughter of the deceased so they are entitled to get the future prospects and the general damages by virtue of the observation of the Hon'ble Constitution

Bench of the Hon'ble Supreme Court passed in **Pranay Sethi.**

In considering the "principle of pay and recovery" it appears to me that in this particular case it has been alleged that one motorcycle at the time of accident rash and negligently dashed the victim. By such the victim succumbed to his injuries. The police case was started on the basis of the said accident vide Ratua Police Station Case No. 581 of 2012 dated 29.08.2012 under Sections 279/338 of IPC. During the course of investigation of this case, one seizure was effected on 23rd of September, 2012 at 13:45 hours. The seizure was meant by production of the documents by the owner of the offending vehicle. On such production it appears that the owner has produced one authorization letter to ply the vehicle in favour of one Bhuban Ch. Mondal from the date of 1.8.2012 to 12.9.2012. After completion of investigation the police has submitted the charge-sheet against one Arup Kr. Das to be responsible for the accident who actually drive the vehicle in a rash and negligent manner. It is true that from the evidences on record and from the police paper it appears that the driver of the offending vehicle was a separate person in favour of whom the owner has issued the authorization letter. It is not clear how the accused of the case has got possession of the motorcycle. The insurance company has not produced anything and has not cited any evidence to the effect that how such violation has been made. The insurance company has the liability to call for the evidences that how such insured vehicle was plied by another person. It is also not clear whether the vehicle was further authorized to accused person or the vehicle was stoled by the accused at the time of accident.

Considering the entire aspects, it is clear that the policy of the insurance company with the owner of the vehicle was vehemently disobeyed. The terms of the policy was breached by the owner itself. So at this juncture, the plea of the insurance company is quite correct that the insurance company is may not liable to pay the compensation.

The identical issue of breach of policy and consequences thereof has been dealt with by the Hon'ble Apex Court in **Swaran Singh, Baljit Kaur and Challa Bharathamma** and many more judgments. The Hon'ble Apex Court in its judgment by three judges Bench in **Swaran Singh** has made a specific guideline what should be done by the learned tribunal in the cases of "pay and recovery". The Hon'ble Apex Court has specifically formulated such guidelines as follows:-

> SUMMARY OF FINDINGS :
>
> The summary of our findings to the various issues as raised in these petitions are as follows:
>
> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance

of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have 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 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 vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) 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), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed 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. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.

For the reasons aforementioned, these petitions are dismissed but without any order as to costs.

On perusal of such guidelines it appears to me that the Hon'ble Apex Court in para (IV) has held that:- **“the insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them”.** In paragraph X of such guidelines the Hon'ble Apex Court has observed that the compensation has to be recovered from the owner after payment to the claimants through the office of the Collector by a Certificate Case. So, on the observation of the Hon'ble Apex Court in **Swaran Singh** it is clear that if there is a ‘breach of policy’ of insurance company though may have no liability to pay the compensation but as it is a beneficial legislation, the insurance company must pay the claimants first and thereafter recover the same from the owner. The Hon’ble Supreme Court has guided how to pay the compensation and how the insurance company can recover the same. So in this case, I think it necessary that the principle of “pay and recovery” may be applicable.

Learned advocate for the insurance company has pressed hard that the observation of the Hon’ble Supreme Court passed in **Challa Bharathamma** may be adopted here.

The observation of Hon’ble Supreme Court in **Challa Bharathamma** regarding the principle of “pay and recovery” is at par with the judgment passed by the Hon’ble Supreme Court in **Swaran Singh.** Recovery option by the insurance company in the **Challa Bharathamma** is made elaborate; wherein Hon’ble Supreme Court has observed that before paying the compensation to the claimants the tribunal must have ascertained that the amount of compensation may be secured by the owner; in the same proceeding. The tribunal after ascertaining such securities; the insurance company may be directed to pay the compensation. I have perused the findings, it is true that the **Challa**

Bharathamma has specifically imposed some condition regarding recovery but the other judgment of Hon'ble Supreme Court which was passed after **Challa Bharathamma** did not followed the same recovery option. At this juncture, I think it necessary to observe that the instant accident happened in the year 2012 and the present claimants are the fateful wife and the minor daughter of the deceased; they are running from pillar to post to get the compensation but nothing has been received by them till today. If the recovery option laid down in ***Challa Bharathamma*** is strictly followed, the claimant shall again suffer immense and the sole purpose of the statute would be frustrated.

Considering the same, I think it necessary to pass an appropriate order so that the matter can be disposed of finally at least on behalf of the claimants. So, to minimize the pain of the claimants it is directed that the insurance company shall pay the compensation within eight weeks from the date of passing of this order and shall recover the same from the owner through the same tribunal by a separate execution proceeding initiated on the basis of this order. It is specifically observed that the insurance company may have the liberty to pray for appropriate order from the tribunal to attach the movable or the immovable property of the owner for the purpose of recovery of the compensation. On such prayer being made, the learned tribunal shall pass the necessary order according to the Law.

In considering the just and proper compensation of this case, the impugned award passed by the learned tribunal is hereby modified and recasted as follows:-

Monthly income of the deceased Rs. 3,000/- per month, the yearly income Rs. 36,000/-. 1/3rd is deducted towards his personal expenses so the yearly dependency comes to Rs. 24,000/-. The claimants are entitled to get the future prospects of 25% of establish income, so 25% comes to Rs. 6,000/- so after adding the 25% of the future prospects the yearly dependency comes to Rs. 30,000/- The applicable multiplier of this case is 14. So after adopting the multiplier the award comes to Rs.4,20,000/- The claimants being the wife and the minor daughter are entitled amounting of Rs. 70,000/- towards the general damages according to the direction of the Hon'ble Apex Court in **Pranay Sethi.** So after adding the general damages the award comes to Rs. 4,90,000/-.

The insurance company is directed to pay the compensation to the claimants amounting to Rs. 4,90,000/- alongwith interest @ 6% per annum from the date of filing of the claim application through the office of the learned tribunal within eight weeks from the date of passing of this order.

The number of claimants are two so the insurance company shall disburse the amount vide two equal account payee cheques in the name of the claimants. The appellant/claimant no. 2 is minor so the appellant No. 1 is at liberty to receive the cheque of appellant No. 2 being her natural guardian mother and shall deposit the same with a Nationalized Bank in a fixed deposit scheme so that the amount may be utilized by the minor appellant No. 2 after attaining her majority. On such deposit the learned tribunal is to disburse the same in favour of the claimants subject to the ascertainment of payment of requisite Court Fees.

After such deposit is made the insurance company is at liberty to initiate and execution proceeding by virtue of this order against the owner as directed hereinabove.

Department is directed to return the LCR promptly to the office of the learned tribunal for the proper compliance of this order.

The instant FMA 2878 of 2013 is disposed of.

All connected applications, if any, stand disposed of.

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)