

(2011) 12 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : CIMA No. 125 of 2010 and CIMA No. 49 of 2011

Bajaj Allianz General Insurance Co. Ltd.

APPELLANT

Vs

Mst. Shamima Banoo and Others

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 168, 170

Citation : (2011) 4 JKJ 6

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, Judge

1. Shri Sarver Hussain Bhat Son of Mohamad Ramzan Bhat Resident of Kanterbugh Khwaja Qasim, Pattan was on 16th February 2007 run over

by vehicle No. JK09-2904 (Tata-Sumo) on National Highway at Hanjiwara. The victim died on spot. Mst. Shameema Banoo--mother of the

victim on 7th April 2004, joined by her husband and two sons, filed a claim petition before Motor Accidental Claims Tribunal, Srinagar. The

petitioners on the strength of averments made in the petition claimed compensation of Rs. 34,30,000/- on account of death of Sarver Hussain Bhat

from the owner of the offending vehicle, its driver and the Insurance Company, with which the offending vehicle was insured.

2. The claim petition was opposed by the Insurance Company inter alia on the grounds that the driver of the offending vehicle was not holding a

valid driving licence at the time of accident and the Insurance Company was not under any obligation to indemnify the owner of the offending

vehicle. The Insurance Company also controverted other averments made in the claim petition. The owner of the offending vehicle pleaded that the Tribunal at Srinagar, lacked jurisdiction to entertain and deal with the claim petition and also made a specific averment that he had taken all steps to ensure that the driver of the offending vehicle held a valid and effective driving licence before he was employed by him as a driver of the offending vehicle. The owner pleaded that the driver of the offending vehicle had been driving the vehicle of the type the owner purchased to earn his livelihood, prior to his engagement as driver by the owner and thus he had reasonable belief that the driving licence in possession of the driver which bore seal and signature of Regional Transport Officer, was valid and effective. The driver in his objections denied involvement of the offending vehicle in the accident. However he did not plead that the licence held by him was valid and genuine.

3. The Tribunal on going through the pleadings settled the following issues for determination :-

(i) Whether on 16.02.2007 Irshad Ahmad Lone respondent No. 3 was plying offending vehicle Tata Sumo bearing registration No. JK09-2904

rashly and negligently as a result of which near Hanjiwara Pattan it hit Sarwar Hussain Bhat who sustained fatal injuries and later on succumbed to the same on spot? OPP.

(ii) Whether the driver/respondent No. 3 of the offending vehicle was not holding valid and effective driving licence and had no authority to ply the vehicle on the date of accident and the offending vehicle was without valid R/P and other vehicular documents on the date of accident so no liability

can be saddled on the company because the insured has breached policy stipulations? OPR-1

(iii) Whether this Tribunal has got no jurisdiction to try and dispose of claim petition? OPR 2 and 3.

(iv) In case issue No. 1 is proved in affirmative, what amount of compensation the petitioner is entitled to, from whom and in what proportion?

OPP.

(v) Relief.

4. The petitioners examined S/Shri Shafiq Hussain Bhat and Haji Abdul Rehman Mir to substantiate their case Shri Mohamad Ramzan Bhat father

of the deceased and petitioner No. 2 in the claim petition also crossed the witness box. The respondent Insurance Company on its part examined

Fayaz Ahmad Koka Junior Clerk ARTO, Anantnag, to discharge the burden, to prove issues, onus whereof was placed on respondent No. 1.

The respondents 2 and 3 examined Shri Mohamad Altaf Wani and Irshad Ahmad Banday to support their case. The owner of the offending vehicle--respondent No. 2 also appeared in the witness box.

5. The Tribunal on going through the evidence held the deceased to have been run over by the offending vehicle driven rashly and negligently by its

driver--respondent No. 3, on 16.02.2007 at Hanjiwara. The Tribunal was of the opinion that though the respondent No. 3 was not having valid

and effective driving licence at the time of accident, yet the respondent No. 2 had made all efforts as were expected of a man of ordinary prudence

to satisfy himself that the respondent No. 3 was having a valid and effective licence and that under such bonafide belief that respondent No. 3 was

employed as driver of the offending vehicle. The Tribunal in the said back ground held that it was not open to the respondent No. 01, to escape

the liability to indemnify the owner.

6. The Tribunal proceeded to work-out loss of dependency applying 14 as multiplier and awarded an amount of Rs. 5.33 lakhs with 6% interests

as compensation from the date of filing of claim petition till its realization. The Tribunal in addition to Rs. 3.78 lakh awarded on account of loss of

dependency/income awarded, an amount of Rs. 75,000/- on account of loss of expectancy of life, pain and suffering and amount of Rs. 75,000/-

on account of future prospects. The rate of interest awarded on the compensation amount was to go up to 9% per month in the event the

Insurance Company failed to deposit the amount within two months from the date of the award.

7. The award dated 10.04.2010 is questioned by the Insurance Company in the present Appeal on the grounds that Tribunal erroneously held

appellant liable to indemnify the owner ignoring the evidence on record. It is pleaded that the appellant having proved that the driver of the

offending vehicle was not having a valid and effective driving licence, only option left with the Tribunal was to hold the owner of the offending

vehicle and its driver liable to pay compensation assessed by the Tribunal to the

claimants. The appellants also question the quantum of compensation awarded by the Tribunal labelling it excessive, exorbitant, unjust and arbitrary. The appellant in particular takes exception to award of Rs. 75,000/- on account of loss of amenities of life, pain, suffering and future prospects. It is further pleaded that as the offending vehicle in terms of its route permit was to be ply within the limits of district Kupwara, the vehicle at the time of accident at Hanjiwara Pattan, district Baramulla was being plied without route permit and in view of the settled legal position the appellant was not under any obligation under the Insurance Contract to indemnify the owner of the vehicle.

8. The claimants also question the compensation awarded by the Tribunal in Cross Appeal No. 49/2011 on the grounds that the Tribunal ought to have taken into account Rs. 12,000/- instead of Rs. 45,00/- as monthly income of the deceased at the time of his death, while computing the loss of dependency. It is further pleaded, that the claimants were entitled to be awarded Rs. 1.50 lakhs on account of funeral expenses as against Rs. 5000/- awarded by the Tribunal.

9. The Insurance Company oppose the Cross Appeal on the grounds that the Tribunal had no evidence before it to even conclude that deceased had income of Rs. 45,00/- per month, and thus there was no merit in the plea that Rs. 12,000/- per month ought to have been determined as income of the deceased. The claimant's case that the amount of Rs. 1.50 lakhs was spent on account of funeral expenses is assailed as unreal and exaggerated.

10. I have gone through the memoranda of Appeal and Cross Appeal, as well as the record received from Tribunal. I have heard counsel for the parties at length.

11. The controversy involved in the Civil 1st. Misc. Appeal and Cross Appeal may be summarised as under:-

(I) Whether the Insurance Company after having found the driver of the offending vehicle to have been without valid and effective driving licence at the time of accident, could still be burdened with liability to indemnify its owner.

(II) Whether the Insurance Company was free from any liability to indemnify the insured on account of the breach of the Insurance Contract by

allowing the offending vehicle to be plied without route permit.

(III) Whether the Insurance Company without having obtained permission in terms of Section of 170 Motor Vehicles Act, to take up all the

defence available to the owner and driver of the offending vehicle was competent to question the quantum of compensation.

(IV) Whether the compensation awarded by the Tribunal is ""just"" within the meaning of Section 168, Motor Vehicles Act.

12. It is no more res integra that in the event driver of the offending vehicle is found to have been without valid and effective driving licence in terms

of Section 3 of the Motor Vehicles Act and to have contravened Section 5 of the Act, the owner of the offending vehicle may be held guilty of

breach of Insurance Contract, making himself liable to pay compensation to the victim of a vehicular accident or his legal representatives. In such a

case because of the breach of Insurance Contract, the insurer cannot be held liable to indemnify the insured for the act, committed by his

employee. It is pertinent to point out that the insured under the Insurance Contract undertakes to ply the vehicle in accordance with the Motor

Vehicles Act, and the Rules, made there-under and the insured by allowing the vehicle to be plied by a person not competent under law to

ply/drive the vehicle contravenes the Provisions of the Act. However, the insured is to be said to have committed breach of the Insurance Contract

when there is evidence before the Tribunal that such breach was intentional or the owner was guilty of gross negligence in handing over vehicle to a

person without effective and valid driving license. To illustrate the owner of the vehicle may allow the vehicle to be plied without route permit in

contravention of Motor Vehicles Act. The breach in such case would be intentional. The breach of the Insurance Contract though not intentional

may still be attributable to negligence on part of the insured. The insured or owner of the vehicle may handover the vehicle to a person without

satisfying himself whether the person to whom the vehicle is handed over has a valid and effective driving licence. Similarly the owner of a vehicle

may employ a person as driver without even enquiring from such person whether he has a valid and effective driving licence to drive the motor

vehicle let alone satisfying himself that the driving licence is genuine and valid.

Where the defence brought on the file indicates that the owner as a matter of

fact did take adequate and reasonable steps to enquire from the person proposed to be employed as a driver, whether such person had a valid licence to drive the vehicle and acted as a man of ordinary prudence while satisfying himself that the driving licence was valid and effective, the owner of the vehicle cannot be held to have been negligent and to have intentionally committed breach of the Insurance Contract. Cases are galore where the owner of the vehicle does not come forward before the Tribunal to insist that he took all steps as were expected of a person of ordinary prudence to satisfy himself that the driver employed by him had a valid and effective driving licence. In such a case once it is proved by the Insurance Company that the driver of the offending vehicle did not have valid and effective licence, the Tribunal would be left with no option but to shift the liability from the Insurance Company to owner of the offending vehicle. However, where the owner of the offending vehicle, as in present case appears before the Tribunal, files his written statement/objections pleading that in view of the factual averments made in the written statement/objections he is to be held to have taken adequate and reasonable steps as expected of a man of ordinary prudence to satisfy himself that the driver of the offending vehicle was in possession of a valid and effective driving licence and thereafter adduces cogent and convincing evidence in support of such stand, the owner of the offending vehicle can not be held guilty of the breach of Insurance Contract.

13. In the case in hand, the owner of the offending vehicle--respondent No. 2 insists that before he employed respondent No. 3, as driver of the offending vehicle the respondent No. 3 was to the knowledge of one and all driving public transport vehicles in the area, leading to a reasonable belief that the respondent No. 3 had a valid and effective licence. The respondent No. 2 has further pleaded that the respondent No. 3 was, as a matter of fact, in possession of a driving licence bearing seal and signature of the Regional Transport Authority, and such licence was being examined by the Traffic Police during routine traffic checking without any objection as to, its genuineness and authenticity. The witnesses examined by the respondent No. 2, have substantiated the stand.

14. It is pertinent to point out that the Insurance Company has not made any effort to dispute the stand taken by respondent No, 2 or rebut the

evidence adduced by him. So viewed, as rightly held by the Tribunal, the respondent No. 2 having acted in a bonafide and reasonable manner

cannot be said to have committed breach of Insurance Contract so as to free the Insurance Company of its liability to indemnify the insured and

pay compensation to the claimants. The respondent No. 3 has not taken a stand in opposition to the case set up by the respondent No. 1. It is true

that most desirable course for owner of a vehicle proposing to employ a driver for driving his vehicle is to approach the Regional Transport

Authority, wherefrom licence has been issued in favour of driver offering himself for employment, to get the driving licence verified. However

having regard to the fact that the Transport Department, though directed in National Insurance Co' Ltd. v. Mst. Saja Begum & Ore CIMA No.

47/2009 decided on 04.03.2010 reported in 2010 (2) JKJ 91 [HC] has not till date placed particulars of all the driving licences issued, on its

Website or the Government Website, it may be difficult for an owner to have access to the record and till such information is made available online

the Motor Accident Claims Tribunal when-ever confronted with a situation like one in present case, has to examine on the strength of facts pleaded

and evidence adduced whether the owner of the vehicle has acted in a good faith and as a person of ordinary prudence.

15. The appellant did not plead before the Tribunal that it could not be fastened with liability to indemnify owner of the offending vehicle, in as

much as, the offending vehicle at the time of accident was found to be plied without route permit. The appellant having failed to plead and prove

absence of liability on the said ground before Tribunal can not take up such plea for first time in Appeal. The ground urged is thus of no help, to the

Appellant Insurance Company and can not be made use of to escape the liability.

16. The insurer in terms of Section 149 (2) of the Act, is competent to take up any one or more defences enumerated in the Provision, to escape

liability to indemnify the insured/owner of the offending vehicle. It is pertinent to point out that while Section 149 casts a duty on the insurer to

indemnify the owner, it makes it mandatory for the Tribunal to array the insurer as a party to the proceedings and permit it to raise any one or more

defences set out in Section 149 (2) of the Act, in opposition to claim petition. The insurer may plead breach of a condition of the policy like a

condition excluding the use of a vehicle for hire or reward, use of vehicle for organized, racing and speed testing or for a purpose not allowed by

the permit under which it is used or a condition excluding driving by a named person or any person not duly licensed or by any person who has

been disqualified for obtaining a driving licence during the period of disqualification. The insurer may allege breach of the condition excluding

liability, for injury caused or contributed to by conditions of war, civil war etc. Section 149(2) of the Act, also makes it possible for the insurer to

plead that the insurance policy is void as it was obtained by non disclosure of material facts or by the representation of facts which have been false

in some material particulars. The insurer cannot raise any defence other than the defences detailed in Section 149 (2) of the Act, except when it is

permitted by the Tribunal in terms of Section 170 of the Act, to raise any other defence available to the owner or driver of the offending vehicle.

17. It is important to note that Section 170 of the Act, visualizes a situation where the owner and/or driver of the offending vehicle is/are in

collusion with the claimants or otherwise avoid to contest a claim. It needs no emphasis that in a good number of cases, the owner and driver of the

vehicle involved in an accident, satisfied that they are to be indemnified by the insurer under the insurance policy, may not be too keen to contest a

claim, as acceptance of the claim because of the insurance cover, is not to expose the driver or owner to any pecuniary loss. In such cases, it

would be unjust to ask the insurer to oppose the claim petition, with its hands, tied at its back, and the defences available to the owner and driver

of the vehicle involved in the accident, not made available to the insurer. However, an insurer to have the liberty to raise all defences in opposition

to the claim including the defences available to the owner and driver of the offending vehicle, has to lay a motion before the Tribunal detailing

reasons that must persuade the Tribunal to grant the leave and the Tribunal may, grant leave to the insurer to contest the claim on all or any of the

grounds that are available to the person against whom claim has been made. In absence of such express permission by the Tribunal, the insurer is

stripped of any right to contest the claim on the grounds other than those set out in Section 149(2) Motor Vehicles Act.

18. It would be advantageous to extract in this regard following observation of the Apex Court in National Insurance Co. Ltd., Chandigarh Vs.

Nicolletta Rohtagi and Others, :-

...an insurer if aggrieved against an award, may file an appeal on those grounds and no other. However, by virtue of Section 170 of the 1988 Act,

where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against

whom the claim has been made or (b) the person against whom the claim has been made has failed to contest the claim, the Tribunal may, for

reasons to be recorded in writing, implied the insurer and in that case it is permissible for the insurer to contest the claim also on the grounds which

are available to the insured or to the person against whom the claim has been made. Thus, unless an order is passed by the Tribunal permitting the

insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two

conditions specified in section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the

insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in section 170 are satisfied and the

award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or

contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation.

19. The perusal of the record reveals that the appellant did not at any point of time make an application u/s 170 of the Motor Vehicles Act, for

permission to oppose the claim on the grounds available to the owner and driver of the offending vehicle. However, the appellant in para 19 of its

reply to the claim petition sought the leave of the Tribunal in terms of Section 170 of the Act, to take all defences available to the respondents 2

and 3 and contest the case on all the grounds apart from the grounds specified u/s 149 (2) Motor Vehicles Act. The Tribunal does not appear to

have passed any order on the plea raised in written statement/objections nor has the appellant insisted on the grant of leave to take such defences.

The question arises whether in absence of the plea having been entertained by the Tribunal and leave granted, the appellant can question the

quantum of compensation awarded by the Tribunal. It is insisted by learned counsel for the appellant that even if the Tribunal has not granted leave

to the appellant to take up all the defences available to the owner and driver of the offending vehicle (respondents 2 and 3) under the Act, still the

appellant having sought such leave, it was to be presumed to have been granted in favour of the appellant.

20. Learned counsel for the appellant relying on the law laid down in *United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and Others*, submits

that the Insurance Company being the "person aggrieved by an award of Claims Tribunal" within meaning of Section 173 (1) of the Act is

competent to maintain an appeal even on the grounds available to the owner and driver of the offending vehicle. Reliance in particular is placed on

the following observation of the Apex Court in the afore-stated case.

9. Can it be said that the Insurance Company should not have any grievance at all even in a case where the award appears to be unjust to that

company? We must bear in mind that the nationalised insurance companies in India are holding public money. What they have to deal with is public

fund. They are accountable to the public for every pie of it. If it is held that no insurance company should feel aggrieved even if the award is

seemingly unjust and that such award amount should go out of the public fund it is public interest which suffers. If the insurance company has

reason to believe that the award was obtained fraudulently with fact was not known to the insured, should we allow public money to be given to

satisfy such an award? In such cases the insurance company must feel aggrieved. Any interpretation denying such aggrieved insurance companies

the opportunity to seek the legal remedy of appeal should not to be adopted unless there is a statutory compulsion, there is nothing in Section 173

or in the other relevant, provisions of the Act which debars the insurance company to resort to the remedy of appeal when it known that the award

is unjust.

12. The person against whom the claim is made is normally the insured of the vehicle involved in the accident. When he failed to contest that claim

made against him the insurer gets the opportunity to contest such claim on all or any of the grounds available to the insured. Such a provision was

absent in the Motor Vehicles Act, 1939 initially and the Parliament inserted it therein only in March 1970. The right of the insured to contest a

claim does not stop with the end of the proceedings before the Tribunal.

21. There is no scope for disagreement with the learned Counsel for the appellant that the Insurance Company whenever aggrieved by an award by Claims Tribunal has a right to call in question the award through the medium of an Appeal. However, the grounds on the award may be assailed are to be restricted to the grounds available to the Insurance Company to question the award in terms of Section 149(2). Once the Insurance Company proposes to question the award on any ground other than the ground available u/s 149 (2) Motor Vehicles Act, the Insurance Company is required to signify its intention before the Tribunal to make use of the grounds not otherwise available to it and obtain permission in terms of Section 170 Motor Vehicles Act. The law laid down in United India Insurance Co' Limited v. Bushan Sachdev and Ore, case (supra) is not in conflict with the observations in National Insurance Co. Ltd., Chandigarh Vs. Nicolletha Rohtagi and Others, case. The law on the subject has been reiterated in United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, and The New India Assurance Company Limited Vs. Dr. Prem Singh Bhadauria and Smt. Sadhna Tripathi, . In Dr. Prem Singh's case the Division Bench of Allahabad High Court observed that as a non-reasoned order u/s 170 of the Act is not to give the insurer right to raise the defences in opposition to the claim petition as are available to the insured, it would be far -- fetched, to say that failure of the Tribunal to pass any order on an application u/s 170 of the Act is to be construed as implied permission. In Jyotsnaben's case the Tribunal made a cryptic order while dealing with an application u/s 170 of the Act. The order of the Tribunal read -- ""granted as prayed for"". The Supreme Court held the order to be without reasons and not to satisfy requirement of Section 170 of the Act.

22. So viewed, the appellant having failed to get permission from the Tribunal to oppose the claim petition on the grounds not available to it/available to the owner or driver of the offending vehicle, cannot question quantum of the compensation. For the reasons discussed there is no merit in the Appeal. The Appeal in the circumstances merits dismissal.

23. The Tribunal while assessing compensation recoverable from the appellant Insurance Company has adhered to and followed law on the subject. There is no merit in the case set up by the respondents in the Cross

Appeal that the Tribunal has not applied correct multiplier or that the income of the deceased at the time of death as assessed by the Tribunal is not based on the evidence brought on the file. The Tribunal appears to have been alive to the settled legal principles, while assessing just compensation, and there is no reason to find fault with the award. Resultantly the Cross Appeal has no merit and is liable to be rejected.

24. For the reasons discussed CIMA NO's. 125/2010 and 49/2011, are dismissed and award dated 10.4.2010, is upheld. Decree sheet be prepared accordingly, the award amount if any unpaid, together with the interests that has accrued thereon be released in favour of claimants/respondents in accordance with rules.