(2020) 08 J&K CK 0010

In the Jammu And Kashmir High Court

Case No : Miscellaneous Appeal No. 129 Of 2017

Bajaj Allianz General Insurance Company Limited — APPELLANT

Vs

Hazara Bibi And Others — RESPONDENT

Date of Decision : 14-08-2020

Acts Referred:

Citation : (2020) 08 J&K CK 0010

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Sunny Mahajan, Ajay Kumar Gandotra

Final Decision : Allowed

Judgement

Sanjeev Kumar, J

1. This appeal by Bajaj Allianz General Insurance Company Limited (hereinafter referred to as ?the appellant?) is directed against the judgment and award dated 23rd February, 2017 passed by the Motor Accident Claims Tribunal, Jammu (for brevity ?the Tribunal?) in file No.265/C titled Hajara Bibi and others v. Bajaj Allianz General Insurance Company Limited and others, whereby the claim petition filed by respondent Nos.1 to 5 (hereinafter referred to as ?the claimants?) has been allowed and the appellant has been directed to pay an amount of 19,79,125/- along with interest @ 7.5% per annum to the claimants.

2. Before taking up the grounds of challenge urged by the appellant, it would be beneficial to refer to few relevant facts which are as under:-

On 23.09.2014, a motor vehicular accident, involving the offending vehicle (407 Swaraj Mazda Truck) bearing registration No.JK21-3559, driven by respondent No.7 in rash and negligent manner, took place at Dhansal, Assar-Doda road within the jurisdiction of police station, Assar, as a result of which the deceased Mohd. Qayoom received fatal injuries and died on spot. The legal heirs/ dependents of the deceased i.e. respondent Nos. 1 to 5 (hereinafter referred to as ?the claimants?) filed a claim petition alleging therein that their breadwinner was killed in the accident due to rash and negligent driving of the offending vehicle in which the deceased along with his livestock was travelling. The claimants claimed the compensation to the tune of ☐ 30,05,000.00 along with interest @ 12% per annum. The claim petition was contested by the appellant through its counsel, Mr. Sanjay Kumar Dhar, whereas Mr. Rampi Sharma, Advocate represented respondent Nos. 6 and 7, owner and drive respectively.

On the basis of the pleadings of the parties, the Tribunal framed the following issues:-

"1. Whether an accident took place on 23.09.2014 at Dhansal Assar-Doda Road involving offending vehicle bearing registration No.JK21-3559 as a result of which deceased Mohd. Qayum received fatal injuries? OPP

2. If issue No.1 is proved in affirmative whether petitioners are entitled to compensation; If so to what amount and from whom? OPP

3. Whether there was any violation of terms and conditions of insurance policy with respect to the vehicle No.JK21-3559 on the date of occurrence, if yes, what is its effect? OPR-1

4. Relief ?O.P. Parties."

3. As is apparent from the issues framed, the onus to prove issue Nos. 1 and 2 was placed on the claimants, whereas the onus of proof with respect to issue No.3 was placed at the appellant.

4. The claimants led their evidence. Apart from the claimant-Hajara Bibi, who entered the witness box to substantiate her claim, two other witnesses, namely, Yakub Hussain (PW2) and Mohd. Ashraf (PW3) were also examined on behalf of the claimants. To discharge the burden of proof of issue No.3, the appellant also led evidence in rebuttal and examined Alam Din (RW1), an official of RTO, Jammu, Chamail Singh (RW2), driver of the offending vehicle and one Vikas Raina (RW3), an official of the appellant.

5. Learned Tribunal after evaluating the evidence on record, held the issue Nos. 1 and 2 proved in favour of the claimants and against the appellant and respondent Nos. 6 & 7, whereas issue No.3 was held not proved by the appellant.

6. Having regard to the age of the deceased, his monthly income and the number of dependants left behind, the Tribunal in light of the law laid down in the cases of Sarla Verma and others v. Delhi Transport Corporation and another, (2009) 6 SCC 121, awarded the following sums:-

1. Loss of Dependence = Rs 15,49,125/-

2. Funeral expenses = Rs 25,000/-

3. Loss of consortium = Rs 1,00,000/-

4. Loss of love and affection to two = Rs 2,00,000/- children

5. Loss of love and affection to parents = Rs 1,00,000/-

6. Loss of Estate = Rs 5,000/-

Total = Rs 19,79,125/-

7. The appellant is aggrieved and challenges the impugned award, inter alia, on the following grounds:-

i) The award of the Tribunal, whereby the appellant has been held liable to indemnify the insured and to pay compensation to the claimants is bad in the eyes of law, for, it was amply proved before the Tribunal by the appellant that the deceased at the time of accident was travelling in the insured vehicle/offending vehicle as an unauthorized/ gratuitous passenger.

ii) The Tribunal committed error of fact and law by making addition to the established income of the deceased on account of loss of future prospects, when the same was not applicable in the case of a self employed person.

iii) The Tribunal has erroneously held issue No.3 not proved despite the fact that the appellant had amply proved by leading cogent evidence that the driver of the offending vehicle was not holding valid and effective driving license to drive the offending vehicle.

8. Mr. Ajay Kumar Gandotra, learned counsel appearing for the claimants, on the other hand, has supported the award and submits that the compensation awarded is, by all means, just and fair and does not call for any interference. He also submits that no plea with regard to the deceased being a gratuitous passenger was ever taken by the appellant before the Tribunal nor any evidence in this regard was led. He, therefore, urges that the plea of the appellant raised for the first time in appeal be ignored.

9. Having heard learned counsel for the parties and perused the record, I am of the view that the plea of the appellant that the deceased was travelling in the offending vehicle as a gratuitous passenger is without any substance. No evidence worth the name has been led by the appellant to substantiate the aforesaid plea. It is interesting to note that the only witness to the accident i.e. Chamail Singh, the driver of the offending vehicle, was examined by the appellant, however, the question as to whether the deceased was a gratuitous passenger or was travelling along with the livestock loaded in the offending vehicle as owner thereof was never put to said Chamail Singh in examination-in-chief. Chamail Singh, the driver of the offending vehicle was the best person to prove as to in what capacity the deceased was travelling in his vehicle. Even Investigating Officer, if examined by the appellant, could have spilled the beans. On the other hand, it is specially pleaded by the claimants that the deceased was carrying his livestock i.e. sheep and goats in the offending vehicle and was travelling therein as owner of the goods. It has been proved by the claimants by

leading oral evidence.

10. It is true, as pointed out by the learned counsel for the appellant, that in the FIR registered with regard to the accident and the challan that followed there is no whisper about any livestock being carried in the vehicle, but that in itself cannot be a ground to reject the oral testimony of the claimant and their witnesses, more so, when the investigation officer has not been examined in the matter. In these circumstances, I feel constrained to accept the view taken by the Tribunal in this regard, though on a limited oral evidence before it.

11. Similarly, with regard to the driving license, the finding of the Tribunal on issue No.3 cannot be found fault with. The Tribunal has elaborately discussed the evidence and law particularly in paragraph No27 of the award with which I fully concur. The offending vehicle, admittedly, was a 407 Swaraj Mazada truck with its unladen weight of 2570 kgs and, therefore, the driver, who was, admittedly, possessing a driving license to drive non-transport vehicle was eligible to drive the transport vehicle.

12. Otherwise also, in view of the legal position enunciated in Mukund Dewangan v. Oriental Insurance Company Limited, AIR 2017 SC 3668, the plea raised in this appeal by the appellant is not tenable.

13. So far as quantum of compensation is concerned, the Tribunal has correctly taken the income of the deceased as ☐ 6,750/- per month. The Tribunal was also right in selecting the multiplier of 17 in view of the age of the deceased. However, the Tribunal has wrongly made an addition of 50% towards loss of future prospects, whereas in terms of the law laid down by the Supreme Court in the case of Oriental Insurance Company Limited v. Pranay Sethi and others, (2017) 16 SCC 680, addition of 40% is provided for the self employed persons upto the age of 40 years. The amount awarded by the Tribunal on conventional heads also deserves to be modified so as to bring it in tune with the law laid down by the Supreme Court in the case of Oriental Insurance Company Limited v. Pranay Sethi and others, (2017) 16 SCC 680. Accordingly, taking the monthly income of the deceased as Rs.6,750/-, adding 40% towards loss of future prospects, the monthly loss of dependency would come to Rs.9450/-. Applying deduction at the rate of 1/4th in view of dependents left behind by the deceased, the total monthly loss of dependency would come to (9450 - 2362) = 7088/-. Applying the multiplier of 17, the total loss of dependency comes to 7088 x 12 x 17 = ☐ 14,45,952/-.

14. In view of the above, the award of the tribunal is modified to the following extent:-

Loss of dependence : Rs 14,45,952.00

Funeral expenses : Rs 15,000.00

Loss of consortium

Loss of spousal consortium to respondent No.1 : Rs 40,000.00

Loss of parental consortium@ 40,000/- each to respondent Nos.2 & 3 : Rs 80,000.00

Filial consortium @ 40,000/- each to Respondent Nos.4 & 5 : Rs 80,000.00

Respondent Nos.4 & 5

Loss of love and affection : Nil

Loss of love and affection to parent : Nil

Loss of estate : Rs 15,000

Total : Rs 16,75,952.00

There shall, however, be no change insofar as interest awarded by the Tribunal and other terms and conditions imposed by the Tribunal are concerned.

15. The appeal is partly allowed and the award of the Tribunal is modified to the aforesaid extent. The amount, if deposited, shall be released in favour of the claimants in terms of the modified award after proper identification and verification. Excess amount, if any, shall be refunded to the appellant.