
(2019) 04 J&K CK 0017

In the Jammu And Kashmir High Court

Case No : MA No. 39 Of 2017, IA No. 01, 02 Of 2017

Bajaj Allianz General Insurance Company Ltd

APPELLANT

Vs

Kamlesh Devi And Others

RESPONDENT

Date of Decision : 25-04-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 11(1)(i), 11(1)(ii), 147(1), 147(a), 147(b)

Citation : (2019) 04 J&K CK 0017

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Baldev Singh, Ankush Manhas

Final Decision : Disposed Off

Judgement

1. This appeal is filed by the appellant/ Bajaj Allianz General Insurance Company Limited against the award dated 26.12.2016 passed in file No.29/Misc. by the learned Motor Accident Claims Tribunal, Bhaderwah (hereinafter to be referred to as ?the Tribunal) vide which the learned Tribunal had awarded a sum of Rs.9,02,400/- to respondent Nos.1 to 6 (hereinafter to be referred to as ? claimants?) as compensation on account of the death of the deceased Payar Chand alongwith interest at the rate of 6% per annum from the date of petition till the payment is realized.

2. The ground of challenge in this appeal are as under:

i. That the learned Tribunal has wrongly fixed the monthly income of the deceased at Rs.4,500/- per month in the absence of any evidence and increased the same by 30% as future prospects;

ii. That the appellant is not liable to satisfy the award because his owner is covered by the Act Policy which provides for limited liability as the owner was insured for five passengers.

3. Factual matrix of this case is that that the deceased Payar Chand was

travelling in a Maruti Van bearing No.JK02F-6622 from Dalain towards Manthala, when the vehicle met with an accident and the deceased sustained multiple injuries for the treatment of which he was first admitted in Sub-District Hospital, Bhaderwah and thereafter to Government Medical College Hospital, Jammu. He was discharged from GMC Jammu on 03.10.2007 with an advice to follow up SOPD after two weeks but he died on 31.10.2007. His widow, three minor children and parents (claimants) have filed the petition for compensation demanding Rs.25,25,000/- as compensation.

4. The learned Tribunal awarded Rs.8,32,400/- as loss of dependency, Rs.10,000/- as funeral expenses, Rs.20,000/- as loss of consortium and Rs.30,000/- for love and affection.

5. From the pleadings of the parties, the learned Tribunal was pleased to frame the following issues in the claim petition:-

(i) Whether the deceased Payar Chand died in a road traffic accident which took place on 28.07.2007 near Manthala-Malani Tehsil Bhaderwah while travelling in the offending vehicle bearing registration No.6622/JK02F, which was being driven in a rash and negligent manner by its driver, Romesh Chander who also died in the said accident ?
OPP

(ii) In case issue No.1 is proved in affirmative, whether petitioners are entitled to compensation, if so to what effect and from whom ?
OPP

(iii) Whether the driver of offending vehicle was not holding a valid and effective driving license at the time of accident, if so to what effect?
OPR-1

(iv) Whether the driver was driving the offending vehicle in violation of the terms and conditions of the Insurance Policy, if so to what effect ?
OPR-1

(v) Relief ?

O.P. Parties.

6. Claimant beside herself has examined Phalail Chand, Mohinder Singh and Sham Lal whereas the appellant has examined only its officer Vikas Rana in rebuttal.

7. The Tribunal found issue No.1 in favour of the claimants holding that the accident involving motor vehicle No.JK02F/6622 in which the deceased was travelling occurred because of negligence of the owner/driver Romesh Chander. Tribunal also found that the deceased Payar Chand died of head injuries as was the opinion of the doctor who conducted post mortem of the body of the deceased. The accident involving the offending vehicle resulted in death of late Payar Chand and when the vehicle fell into deep gorge as stated in the copy of

the FIR, and the witness Pw-Phalail Chand and Mohinder Singh who deposed that accident took place due to rash and negligent driving of the driver.

8. The appellant has not questioned the finding of the Tribunal in respect of Issue No.1. Moreover, the version of the claimant is duly corroborated by the oral evidence and copy of FIR, it is settled law that in matters relating to motor accidents claim, it is sufficient that there is preponderance of probability as to the manner of accident and strict proof of the same is not required may be it is for this reason, the appellant has not challenged finding on Issue No.1. This gesture of Mr. Baldev Singh, learned counsel appearing for the appellant is laudable. The finding of the Tribunal in Issue No.1 is confirmed.

9. Regarding the income of the deceased, PW-Sham Lal stated that the deceased was working as Barber and he had also hired a shop from where he was operating as Barber but he does not know much about his income. Though the deceased according to this witness also used to weave blankets which is quite common in hilly areas where the people do engage in weaving blankets in winter, which fetch reasonably good income. At the time of accident, his daily income was nearly Rs.100/- per day. According to him, the claimants were entirely dependent on the income of the deceased. This is the only evidence regarding monthly income of the deceased. Appellant-Insurance Company had examined one Vikas Raina to prove that the offending vehicle was registered for the period w.e.f. 27.01.2007 to 26.01.2008 and the Policy covers five passengers and liability was limited to Rs. 80,000/- per passenger.

10. While discussing the evidence, the Tribunal assumed the monthly income of the deceased at Rs. 4,500/- per month which is what an unskilled labourer would get, because amount of guess work is permissible in determining the income of the deceased who had no permanent income, but the fact remained that the deceased was managing family of six dependents. Even if the parents are excluded, the deceased had to look after his own family comprising four members. So the assumption made by the learned Tribunal is justified because he being an able bodied person could earn that much to maintain his family, therefore, the monthly income of the deceased would be as Rs.4,500/-. Since his dependants were three children, his widow besides aged parents, so 1/4th of the income would be deducted for his personal and living expenses as per the law laid down by the Hon'ble Apex Court in Sarla Verma & ors. vs. Delhi Transport Corporation & anr. AIR 2009 SC 3104, therefore, after deduction, the monthly income comes to $\text{Rs.}4500 - 1125 = \text{Rs.}3375/-$. The claimant would be entitled to an increase of 40% towards his future prospectus in view of the judgment of the Apex Court in National Insurance Company Limited Versus Pranay Sethi and ors. '2017 (16) SCC 680, therefore, the income of the deceased after adding 40% would be $\text{Rs.}3375 + 1350 = \text{Rs.}4725/-$. Thus, the annual income of the deceased comes to $\text{Rs.}4725 \times 12 = \text{Rs.}56,700/-$. The age of the deceased at the time of accident was 30 years according to his Provisional Certificate issued by Head Master Govt. Model High School Chinta (Bhaderwah). According to the law

laid down in Sarla Verma's case (supra), multiplier of 17 is to be applied, so the total loss of dependency of the deceased who was 30 years old would be Rs.56,700 X 17 = Rs.9,63,900/-.

11. In terms of the Hon'ble Apex Court judgment in Pranay Sethi's case(supra), the claimants are also entitled to Rs.15,000/- as Funeral Expenses, Rs.15,000/- as Loss of Estate and claimant No.1/widow of the deceased is also entitled to Rs.40,000/- as Loss of Consortium, therefore, total amount of compensation comes to Rs.10,33,900/- with 6% interest from the date of filing of the petition.

12. This takes us to the liability of the Insurer. The learned Tribunal had directed the appellant to pay an amount as the owner was insured with it but whether it is an Act policy or comprehensive insurance policy makes reference to its contents necessary. In the Schedule of Premium, it contains as follows:

"Basic third party liability Rs.670".

This is followed by limits of liability. The declaration reads as under:

"Under Section 11-1(i) of the Policy, death or bodily injury. Such amount as is necessary to meet the requirement of Motor Vehicles Act, 1988 under Section 11-1(ii) damages to the third party property Rs.75,000/-.

13. The next question is whether the occupant is a third party covered by the insurance policy issued by the appellant. Though the question is not relevant in view of the definition of Section 11-1(i) of the Standard Motor Package Policy as reproduced in National Insurance Company Ltd. v. Bala Krishnan (2013) 1 SCC 731.

14. It is wrong to submit that the deceased was a passenger as no such plea was raised in the written objections. He was only an occupant and except insurer and the insured. He was a 3rd party. A three judges Bench in National Insurance Company Ltd. vs Bala Krishnan, 2013 (1) SCC 731, after reproduced Section 147 (1) of the Motor Vehicles Act, 1988, held that "On a scanning of the said provision, it is evident that the policy of insurance must be a policy which complies with the conditions enumerated under Section 147(a) & (b). It is also provided that the Policy is not required and also stipulates any contractual liability. Para Nos.21 to 26 of the said judgments are as under :-

21. At this stage, it is apposite to note that when the decision in Bhagyalakshmi was rendered, a decision of High Court of Delhi dealing with the view of the Tariff Advisory Committee in respect of "comprehensive/package policy" had not come into the field. We think it apt to refer to the same as it deals with certain factual position which can be of assistance. The High Court of Delhi in Yashpal Luthra v. United India Insurance Co. Ltd., after recording the evidence of the competent authority of Tariff Advisory Committee (TAC) and Insurance Regulatory and Development Authority (IRDA), reproduced a circular dated 16.11.2009 issued by IRDA to CEOs of all the Insurance Companies restating the factual position relating to the liability of Insurance companies in respect of a pillion rider on a

two-wheeler and occupants in a private car under the comprehensive/package policy.

22. The relevant portion of the circular which has been reproduced by the High Court is as follows: (Yashpal Luthra case, ACJ pp.1419-20 Para 20)

"Insurance Regulatory and Development Authority" Ref: IRDA/NL/CIR/F&U/073/11/2009 Dated: 16.11.2009

To,

CEOs of all general insurance companies

Re: Liability of insurance companies in respect of occupants of a Private car and pillion rider on a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).

Insurers' attention is drawn to wordings of Section (II) 1 (ii) of Standard Motor Package Policy (also called Comprehensive Policy) for private car and two-wheeler under the (erstwhile) India Motor Tariff (IMT). For convenience the relevant provisions are reproduced hereunder:

Section II-Liability to Third Parties

1. Subject to the limits of liabilities as laid down in the Schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of-

(i) death or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of employment of such person by the insured.

It is further brought to the attention of insurers that the above provisions are in line with the following circulars earlier issued by the TAC on the subject:

(i) Circular M.V. No. 1 of 1978-dated 18-3-1978 (regarding occupants carried in Private Car) effective from 25.3.1977.

(ii) MOT/GEN/10 dated 2.6.1986 (regarding pillion riders on a two-wheeler) effective from the date of the circular.

The above circulars make it clear that the insured liability in respect of occupant(s) carried in a private car and pillion rider carried on two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference.

The Authority vide circular No. 066/IRDA/F&U/Mar-08 dated 26.3.2008 issued under File & Use Guidelines has reiterated that pending further orders the

insurers shall not vary the coverage, terms and conditions wording, warranties, clauses and endorsements in respect of covers that were under the erstwhile tariffs. Further the Authority, vide circular No. 019/IRDA/NL/F&U/Oct-08 dated 6.11.2008 has mandated that insurers are not permitted to abridge the scope of standard covers available under the erstwhile tariffs beyond the options permitted in the erstwhile tariffs. All general insurers are advised to adhere to the afore-mentioned circulars and any non-compliance of the same would be viewed seriously by the Authority. This is issued with the approval of competent authority.

Sd/-

(Prabodh Chander)

Executive Director

(Emphasis supplied)

23. The High Court has also reproduced a circular issued by IRD dated 3.12.2009. It is instructive to quote the same: (Yashpal Luthra case, ACJ pp.1422-23, Para 23)

"INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY"

Ref : IRDA/NL/CIR/F&U/078/12/2009

Dated: 3.12.2009.

To,

All CEOs of All general insurance companies (except ECGC, AIC, Staff Health, Apollo)

Re: Liability of insurance companies in respect of occupant of a private car and pillion rider in a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).

Pursuant to the Order of the Delhi High Court dated 23.11.2009 in Yashpal Luthra v. United India Insurance Company Ltd., the Authority convened a meeting on 26.11.2009 of the CEOs of all the general insurance companies doing motor insurance business in the presence of the counsel appearing on behalf of the Authority and the leaned amicus curie.

Based on the unanimous decision taken in the meeting by the representatives of the general insurance companies to comply with the IRDA circular dated 16th November, 2009 restating the position relating to the liability of all the general insurance companies doing motor insurance business in respect of the occupants in a private car and pillion rider on a two wheeler under the comprehensive/ package policies which was communicated to the court on the same day i.e. November 26, 2009 and the court was pleased to pass the order (dt. 26.11.2009) received from the Court Master, Delhi High Court, is enclosed for

your ready reference and adherence. In terms of the said order and the admitted liability of all the general insurance companies doing motor insurance business in respect of the occupants in a private car and pillion rider on a two-wheeler under the comprehensive/package policies, you are advised to confirm to the Authority, strict compliance of the circular dated 16th November, 2009 and orders dt. 26.11.2009 of the High Court. Such compliance on your part would also involve:

(i) withdrawing the plea against such a contest wherever taken in the cases pending before the MACT, and issue appropriate instructions to their respective lawyers and the operating officers within 7 days;

(ii) with respect to all appeals pending before the High Courts on this point, issuing instructions within 7 days to the respective operating officers and the counsel to withdraw the contest on this ground which would require identification of the number of appeals pending before the High Courts (whether filed by the claimants or the insurers) on this issue within a period of 2 weeks and the contest on this ground being withdrawn within a period of four weeks thereafter;

(iii) With respect to the appeals pending before the Hon'ble Apex Court, informing, within a period of 7 days, their respective advocates on record about the IRDA Circulars, for appropriate advice and action. Your attention is also drawn to the discussions in the CEOs meeting on 26.11.2009, when it was reiterated that insurers must take immediate steps to collect statistics about accident claims on the above subject through a central point of reference decided by them as the same has to be communicated in due course to the Honourable High Court. You are therefore advised to take up the exercise of collecting and collating the information within a period of two months to ensure necessary & effective compliance of the order of the Court. The information may be centralized with the Secretariat of the General Insurance Council and also furnished to us.

IRDA requires a written confirmation from you on the action taken by you in this regard.

This has the approval of the Competent Authority.

Sd/-

(Prabodh Chander)`

Executive Director

(Emphasis added)

24. It is extremely important to note here that till 31st December, 2006 the Tariff Advisory Committee and, thereafter, from 1st January, 2007, IRDA functioned as the statutory regulatory authorities and they are entitled to fix the tariff as well as the terms and conditions of the policies by all insurance companies. The High Court had issued notice to the Tariff Advisory Committee and the IRDA to explain the factual position as regards the liability of the insurance companies in respect

of an occupant in a private car under the "comprehensive/package policy". Before the High Court, the

Competent Authority of IRDA had stated that on 2nd June, 1986, the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the "comprehensive policy" and the said position continues to be in vogue till date. It had also admitted that the "comprehensive policy" is presently called a "package policy". It is the admitted position, as the decision would show, the earlier circulars dated 18th March, 1978 and 2nd June, 1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the "comprehensive/package policy" irrespective of the terms and conditions contained in the policy. The competent authority of the IRDA was also examined before the High Court who stated that the circulars dated 18th March, 1978 and 2nd June, 1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 1st July, 2002 and they continue to be operative and binding on the insurance companies. Because of the aforesaid factual position, the circulars dated 16th November 2009 and 3rd December, 2009, that have been reproduced hereinabove, were issued.

25. It is also worthy to note that the High Court, after referring to individual circulars issued by various insurance companies, eventually stated thus: (Yashpal Luthra case, ACJ p.1424, Para 27)

"27. In view of the aforesaid, it is clear that the comprehensive/package policy of a two wheeler covers a pillion rider and comprehensive/package policy of a private car covers the occupants and where the vehicle is covered under a comprehensive/package policy, there is no need for Motor Accident Claims Tribunal to go into the question whether the Insurance Company is liable to compensate for the death or injury of a pillion rider on a two-wheeler or the occupants in a private car. In fact, in view of the TAC's directives and those of the IRDA, such a plea was not permissible and ought not to have been raised as, for instance, it was done in the present case."

26. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger

Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

16. Since the policy covers the occupant of a private car, therefore, it is comprehensive policy as per Section-11-(1)(i) of the Act and not an Act Policy as contended by the learned counsel appearing for the appellant, but it is a package policy. Respondents further denied any liability relying on the judgment reported in 2013 ACJ 199 pleading that the occupant of a private car is not covered by the Act Policy, which is contrary to the policy which states that the appellant is bound to pay the compensation under the Motor Vehicle Act as determined by law as reproduced in Para-22 of the judgment reported in ?National Ins. Co. Ltd vs. Balakrishnan & Anr., '2013 ACJ 731 replied by the appellants. Section -II (i) is reproduced as under:-

"Section II - Liability to Third Parties?

1. Subject to the limits of liabilities as laid down in the Schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of -

(i) death or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of employment of such person by the insured.? It is further brought to the attention of insurers that the above provisions are in line with the following circulars earlier issued by the TAC on the subject:

(i) Circular M.V. No. I of 1978 - dated 18th March, 1978 (regarding occupants carried in Private Car) effective from 25th March, 1977.

(ii) MOT/GEN/10 dated 2nd June, 1986 (regarding pillion riders in a two-wheeler) effective from the date of the circular.

The above circulars make it clear that the insured liability in respect of occupant(s) carried in a private car and pillion rider carried on two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference.

The Authority vide circular No. 066/IRDA/F&U/Mar-08 dated March 26, 2008 issued under File & Use Guidelines has reiterated that pending further orders the insurers shall not vary the coverage, terms and conditions wording, warranties, clauses and endorsements in respect of covers that were under the erstwhile tariffs. Further the Authority, vide circular No. 019/IRDA/NL/F&U/Oct-08 dated November 6, 2008 has mandated that insurers are not permitted to abridge the scope of standard covers available under the erstwhile tariffs beyond the options

permitted in the erstwhile tariffs. All general insurers are advised to adhere to the afore-mentioned circulars and any non-compliance of the same would be viewed seriously by the Authority. This is issued with the approval of competent authority."

15. Since the occupant of a private car is specifically covered by the Policy, therefore, it is not an Act Policy. In view of the above, the appellant has no case because it is not an Act Policy.

16. The Apex Court in Magma General Insurance Co. Ltd v Nanu

Ram Alias Chuhru Ram and others in Civil Appeal No. 9581 of 2018

has held that the loss of consortium includes filial consortium, that is the right of the parents to be compensated in case of the death of the child. The amount awarded to the parents is compensation for loss of love, affection, care and companionship of the deceased child. Thus both the parents are entitled to Rs. 40,000/- each on loss of love and affection. Thus, the claimants are entitled to the total compensation as follows:-

Loss of Dependency

-

Rs.9,63,900/

Funeral Expenses

-

Rs. 15,000/-

Loss of Estate

-

Rs. 15,000/-

Loss of consortium to respondent No.1(wife)-

-

Rs. 40,000/-

Loss of Filial Consortium

-

Rs. 80000/- (Rs. 40,000 payable to each of the parents)

Total

-

Rs. 11,13,900/-

17. The award is, thus, modified in the aforementioned terms to make it just compensation. Awarded amount shall be distributed to the claimants in terms of the award as given above, i.e., respondent Nos.5 & 6 will get awarded amount including filial consortium of Rs.40,000/- each and the rest of the amount will be distributed in equal shares among the rest of the claimants alongwith interest at the rate of 6% from the date of filing of the petition till its realization.

18. Appeal is disposed of and Registry is directed to disburse the amount of compensation in the abovementioned terms