
(2012) 08 DEL CK 0133

In the Delhi High Court

Case No : Mac. App. No. 780 of 2010 and Mac. App. No. 894 of 2010

Bajaj Allianz General Insurance Company Ltd.

APPELLANT

Vs

Sheela Devi and Others
 Sheela Devi and Others Vs
Mukesh Kumar and Others

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 149(2)(a)(i)(ii), 149(2)(a)(ii)

Citation : (2012) 08 DEL CK 0133

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Neerja Sachdeva in Mac. app. No. 780/2010, Mr. O.P. Mannie in Mac. app. No. 894/2010 and Mac. app. No. 1178/2011, for the Appellant; O.P. Mannie, Advocate for the Respondents No. 1 and 2 in Mac. App. No. 780/2010, Mr. Shahid Ali, Advocate for the Respondent No. 2, Ms. Neerja Sachdeva, Advocate for the Respondent No. 3 Insurance Company in Mac. App. No. 894/2010 and Ms. Neerja Sachdeva, Advocate for the Respondent Insurance Company, Mr. Shahid Ali, Advocate for the Respondent No. 4/Owner in Mac. App. No. 1178/2011, for the Respondent

Judgement

G.P. Mittal, J.—These three Appeals (MAC. APP. 780/2010, Mac. App. 894/2010 and MAC. APP. 1178/2011) arise out of a common judgment dated 19.08.2010 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby a compensation of Rs. 6,28,642/- was awarded in favour of the Claimants(the deceased's parents) for the death of Ashish Kumar, a bachelor who was a 3rd year student pursuing B.Tech. in Electronics and Communication Engineering(ECE). MAC. APP. 780/2010 has been preferred by Bajaj Allianz General Insurance Company Ltd., the insurer of the offending vehicle, truck No. RJ-14-G-9150, which caused the accident. Its plea is that the compensation awarded is exorbitant and excessive as in the absence of any evidence with regard to the deceased's future prospects, the Claims Tribunal erred in making an addition of 50% in the deceased's income to award loss of dependency. It is stated that since the Appellant Insurance Company successfully proved the

breach of the policy, it was entitled to be exonerated instead of making it liable to pay the compensation and recover it from the owner and the driver.

2. MAC. APP. 894/2010 has been preferred by the Claimants, that is, the deceased's parents for enhancement of compensation. It is averred that the deceased was a very bright student pursuing Electronics and Communication Engineering(ECE) from Amity School of Engineering & Technology, Bijwasan. His potential income ought to have been taken into consideration to award the loss of dependency.

3. MAC. APP. 1178/2011 are the Cross-Objections to MAC. APP. 780/2010 preferred by the Respondent No. 4, the owner of the offending vehicle. His plea is that temporary permit was valid upto 31.08.2008. The Claims Tribunal erred in holding that the Respondent No. 4 did not possess a valid permit to ply the truck No. RJ-14-G-9150 in the National Capital Territory of Delhi. Thus, according to the owner, the Claims Tribunal erred in granting recovery rights to the Insurance Company against him.

4. For the sake of convenience, Appellant in MAC. APP. 780/2010 shall be referred as the Insurance Company, Appellants in MAC. APP. 894/2010 as the Claimants and the Appellant in MAC. APP. 1178/2011 as the owner of the offending vehicle.

5. First, I shall deal with the quantum of compensation. According to the Claimants, the deceased was a bachelor aged 19 1/2 years. He was a 3rd year student of Electronics and Communication Engineering(ECE) at Amity School of Engineering & Technology, Bijwasan, New Delhi. It was claimed that after completion of the course, the deceased would have been gainfully employed with an annual package ranging between Rs. 5 to 10 lakhs. During inquiry before the Claims Tribunal, both the Claimants filed their affidavits. Devi Singh (PW1), the deceased's father, filed his affidavit Ex. PW1/A and testified that the deceased was a student of Electronics and Communication Engineering(ECE) at Amity School of Engineering & Technology, Bijwasan, New Delhi. His testimony in this regard was not challenged in cross-examination. PW1 deposed that his son worked as a part time employee with a company for fifteen days at a salary of Rs. 8,000/- per month.

6. Sheela Devi (PW2), the deceased's mother, filed her affidavit Ex. PW2/A. She deposed that after completion of his course, the deceased would have got a salary of more than Rs. 50,000/- per month. She proved certified copy of the criminal records and documents with regard to the deceased's educational qualification and his pursuing B.Tech. as Exs. PW2/1 to PW2/16.

7. It is no longer res integra that potential income of a student pursuing professional course has to be taken into consideration to award the loss of dependency.

8. In the case of Haji Zainullah Khan (Dead) by Lrs. Vs. Nagar Mahapalika,

Allahabad, , death of a young boy, aged 20 years took place in an accident which happened in the year 1972. The deceased was a student of B.Sc Ist year (Biology), a compensation of Rs. 1,46,900/- was increased and rounded off to Rs. 1,50,000/-.

9. In Ganga Devi & Ors. v. New India Assurance Co. Ltd. & Ors., MAC APP. 359/2008, decided by this Court on 23.11.2009, which related to the death of a student (studying medicine) who was doing internship and was to be awarded the MBBS degree in a short time, the Tribunal awarded a compensation of Rs. 9,35,352/- on the basis of the minimum wages of a Graduate. This Court observed that although the deceased was getting a stipend of Rs. 5,000/- per month at the time of his death due to the accident, he would have ultimately joined as a doctor at a salary ranging between Rs. 16,000/- per month to Rs. 25,000/- per month. Thus, the average monthly income of the deceased was taken as Rs. 18,000/- and after adding 50% towards future prospects, the compensation was enhanced to Rs. 21,36,000/.

10. In Ramesh Chand Joshi v. New India Assurance Company MAC APP. 212-213/2006, decided on 20.01.2010, this Court took the potential income of a BE (Bio-Technology) First year student of Delhi College of Engineer (DCE) as Rs. 38,333/- per month.

11. It is urged by the learned counsels for the owner as also the Insurance Company that no reliable evidence was produced to prove that the deceased was pursuing B.Tech. Therefore, his potential income cannot be taken into consideration. In this regard, it is important to note that PW1 and PW2's testimony that the deceased was pursuing Electronics and Communication Engineering(ECE) from Amity School of Engineering & Technology was not challenged in cross-examination. The Claimants proved on record the receipts for deposit of fee with Amity School of Engineering & Technology. Further, they proved the statement of marks Exs. PW2/7 and PW2/8 issued by Guru Gobind Singh Indraprastha University for the first and second semester. The Claimants also proved copy of marks by CBSE for Secondary School Examination and Senior Secondary Examination as Exs. PW2/4 and PW2/5. The marksheet Ex. PW2/5 shows that the deceased scored 58.6% marks in Senior School Certificate Examination. Although, no witness from Amity School of Engineering & Technology was examined to prove the mark sheet, but in the absence of any rebuttal to PW1 and PW2's testimony and the documents with regard to the educational qualification Exs. PW2/7 and PW2/8, I would rely thereon to conclude that the deceased was a 3rd year student of B.Tech. in Electronics and Communication Engineering(ECE). Thus, there is no manner of doubt that the potential income of an Engineer has to be taken into consideration to award loss of dependency.

12. No evidence was led by the Claimants with regard to the income which the deceased would have earned on completion of the course. No evidence was brought to prove the placements and the pay package offered by various

companies to a student of Amity School of Engineering & Technology in the year 2009 and thereof.

13. A Division Bench of Andhra Pradesh High Court in B. Ramulamma and Others Vs. Venkatesh, Bus Union and Another, , held that it was very difficult to determine the income of a student who was about to complete his course. It was observed that thus it was appropriate and reasonable to take a salary paid at the entry level as fixed by the Govt. for such jobs.

14. Turning to the facts of the instant case, although the deceased was pursuing B.Tech. in Electronics and Communication Engineering(ECE), yet the institution from which the course was being pursued was an ordinary education. The salary of a Group "A" employee in the year 2008 on a Basic Pay of Rs. 15,600/- was Rs. 23,200/-. In B.Ramulamma & Ors., it was held that the students who had completed or were in the final year or last semester of B.Tech., B.E., B.C.A., M.Tech. M.E. or M.B.A., M.C.A., etc. courses and who died in the motor accidents or sustained permanent disability, their salaries could also be fixed on the basis of the salary of their classmates when they entered into jobs. Some percentage, say, 10 per cent per year can be deducted in respect of the students studying in III year or II year as the case may be. In the circumstances, I would take the potential income of the deceased to be Rs. 20,000/- per month. Since the deceased was not doing engineering from any prestigious college and university, I would not grant any future prospects. The loss of dependency thus comes to Rs. 17,25,000/- (Rs. 20,000/- x 12 = 2,40,000/- - 10,000/- (Income Tax) x 1/2 x 15). I would further make a provision of Rs. 25,000/- towards loss of love and affection and Rs. 10,000/- each towards loss to estate and funeral expenses. The overall compensation thus comes to Rs. 17,70,000/-.

15. Thus, the compensation is enhanced from Rs. 6,28,642/- to Rs. 17,70,000/-. The enhanced compensation of Rs. 11,41,358/- shall carry interest @ 7.5% per annum from the date of the filing of the Petition till its payment. The compensation shall be equally shared between the Claimants, who are the deceased's parents.

16. Now comes the question of liability. In the Cross-Objection (MAC. APP. 1178/2011) preferred by the owner, an Application for additional evidence filed by the owner was allowed and the owner was granted an opportunity to prove the permit held by him on the date of the accident. A perusal of the record shows that one witness from Regional Transport Office, Jaipur, Rajasthan was present before the Registrar in pursuance of the summons issued to him. The owner, however, preferred not to examine him. The learned counsel for the owner (Respondent No. 4) closed his evidence by a statement made on 16.08.2012.

17. During inquiry before the Claims Tribunal, the Insurance Company examined R3W1 Surender Kumar Sharma. He deposed that the owner (Mitar Pal Singh) was issued a permit to ply truck No. RJ-14-G-9150 in the State of Rajasthan from

29.08.2006 to 28.09.2011. The testimony was not challenged by the driver and the owner. The Claims Tribunal thus opined that the Insurance Company will pay the compensation in the first instance and will recover from the owner. Paras 33 to 35 of the impugned judgment are extracted hereunder:

33. R3, in order to prove that there was no valid permit of the offending vehicle, has examined Sh. Surender Kumar Sharma R3W1. This witness has stated that the offending vehicle was not granted permit for Delhi. Not even a single question was put to this witness on behalf of the R2 i.e. the owner of the offending vehicle.

34. Therefore, R1, is the principal tort feaser. R2 and R3 are vicariously liable. All the respondents are held jointly and severally liable to pay the awarded amount. However, since the vehicle was insured with R3, therefore, it shall pay the awarded amount by depositing account payee cheques in favour of petitioners.

35. Since R3 has proved that the offending vehicle did not have valid permit for Delhi on the date of accident and Smt. Kirti Sobti, R3W2 has proved the policy Ex. R3W2/3, therefore, in view of Bharathamma and Others, III (2004) ACC 292(SC), R3 is entitled to recover the awarded amount from R2.

18. As stated earlier, the owner was again granted an opportunity to rebut the Insurance Company's evidence that the owner did not possess any permit to ply the offending vehicle in National Capital Territory of Delhi where this accident occurred. A witness from RTO, Jaipur was also present. The learned counsel for the owner preferred not to examine him and closed the evidence. It is, therefore, clear that there was nothing available with the owner to rebut R3W1's testimony that the owner did not possess any permit to ply the vehicle in Delhi.

19. It is urged by the learned counsel for the Insurance Company that since it has successfully proved the breach of the terms of the policy, it should be exonerated and the owner who is present before the Court should be made liable to pay the compensation.

20. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by a three Judge Bench report in Sohan Lal Passi Vs. P. Sesh Reddy and others, . As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned u/s 149(2)(a)(i)(ii) of the Act. As stated above, the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main

statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi* analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia*. In *New India Assurance Co., Shimla Vs. Kamla and Others* etc. etc., , the Supreme Court referred to the decision of the two Judge Bench in *Skandia*, the three Judge Bench decision in *Sohan Lal Passi* and held that the insurer who has been made liable to pay the compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravan and Others*, . Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the legislature making it prohibitory for motor vehicles being used in public places

without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, .

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence.....

21. Again in *United India Insurance Company Ltd. Vs. Lehu and Others*, , in para 18 of the report the Supreme Court referred to the decision in *Skandia, Sohan Lal Passi and Kamla* and held that even where it is proved that there was a conscious or willful breach as provided u/s 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in *Skandia* and *Sohan Lal Passi* cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance.....

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20.If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in *Skandia, Sohan Lal Passi* and *Kamla* cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

22. The three Judge Bench of the Supreme Court in *National Insurance Co. Ltd. Vs. Swaran Singh and Others*, again emphasized that the liability of the insurer

to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi, Kamla and Leheru. Paras 73 and 105 of the report are extracted hereunder:

73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

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105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle.

23. This Court in (MAC APP. No. 329/2010) Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in National Insurance Co. Ltd. Vs. Kusum Rai and Others, ; National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, ; Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, and Premkumari and Others Vs. Prahlad Dev and Others, and held that in view of the three Judge Bench decision in Sohan Lal Passi and Swaran Singh, the liability of the Insurance Company vis-?-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

24. In view of this, the Insurance Company will first pay the compensation and would then recover from the owner Respondent No. 4 in MAC. APP. 780/2010.

25. The compensation awarded by the Claims Tribunal shall be released to the Claimants in terms of the impugned judgment. 60% of the enhanced compensation shall be held in fixed deposit in the name of the Claimants for two years, four years and six years in equal proportion. Rest of the amount shall be released on deposit.

26. The Bajaj Allianz General Insurance Company Ltd. is directed to deposit the enhanced compensation along with interest in UCO Bank, Delhi High Court Branch in the name of the Claimants within six weeks.

27. Appeal filed by the Insurance Company being MAC. APP. 780/2010 and Appeal filed by the owner being MAC.APP. 1178/2011 are dismissed with costs throughout.

28. The Appeal filed by the Claimants being MAC. APP. 894/2010 is allowed with costs in above terms.

29. Statutory amount of Rs. 25,000/- shall be refunded to the Bajaj Allianz General Insurance Company Ltd. Pending Applications stand disposed of.