(2018) 07 GAU CK 0062

In the Gauhati High Court

Case No : Moter Accident Appeal No . 218 Of 2012

National Insurance Co Ltd — APPELLANT

Vs

Mohibul Islam And Anr — RESPONDENT

Date of Decision : 19-07-2018

Acts Referred:

Citation : (2018) 07 GAU CK 0062

Hon'ble Judges : MIR ALFAZ ALI, J

Bench : Single Bench

Advocate : B.K. Purkayastha, H.N. Sarma, S.C. Biswas

Final Decision : Dismissed

Judgement

1. Heard Mr. B.K. Purkayastha, leaned counsel for the appellant/insurance company and Mr. S.C. Biswas, learned counsel for the

respondent/claimant as well as Mr. H.N. Sarma, learned counsel for the owner of the vehicle.Â

2. This appeal is by the insurance company against the judgment and award dated 07.06.2012 passed by the MACT, Bongaigaon in MAC Case No.

151/2008/2011.

3. The father of the claimant Akbar Ali was knocked down by the vehicle bearingregistration No. WB-33/1-3164, when he was pulling rickshaw. As a

result of the accident, said Akbar Ali sustained injury and died. The accident occurred due to rash & negligent driving of the offending vehicle, which

was owned by the respondent No. 2 and insured with the appellant, National Insurance Company Limited. The Tribunal granted an award of Rs.

4,36,500/.

4. Aggrieved by the said award, the insurance company preferred the instant

appeal

5. The sole question raised in this appeal by the insurance company, to avoid the liability isthat the driver of the offending vehicle did not have valid

driving license at the time of accident. The contention of the learned counsel for the appellant is that the driver having valid driving license was a

condition of the policy and there was a violation of the condition of the policy as the driver did not have valid license at the time of accident and as

such, insurance company could not be saddled with the responsibility to satisfy the award. Learned counsel for the owner of the vehicle, resisting the

submission of the learned counsel for the insurance company, contended that the driver had valid driving license and the same was also seized by

police at the time of accident and in fact, he has also produced a copy of the driving license today.Â

6. In order to substantiate the plea with regard to driving license, the insurance companyexamined one of itâ??s employee as DW-1. The DW-1

stated in his evidence, that the insurance company engaged an investigator, who investigated the genuineness of the driving license and submitted a

verification report. The DW-1 also proved the said report and marked as Ext.A, in order to show, that the driving license in question was not issued in

favour of the driver of the offending vehicle, Manoj Kumar. Apparently, the DW-1, who produced the Ext.A, did not have personal knowledge as to

the Ext.A. According to him, it was submitted by their investigator on the basis of the report of the concerned DTO. However, neither the

investigator, who submitted the verification report, nor the DTO was examined to prove that the driving license was fake. This being the position, the

evidence of DW-1 appears to be of no use, as he had no personal knowledge about the Ext.A. Apparently, police seized the driving license, which

prima facie demonstrated that at the time of accident, the driver had valid driving license.

7. It is the settled principle of law that when a party to contract sought to avoid thecontractual liability, raising the plea of violation of the terms &

conditions of contract, burden to prove the violation, lies with the party, who alleges violation. In the present case, admittedly there was a valid

insurance policy, and the insurance company sought to avoid the liability, alleging violation of condition of the policy. Therefore, necessarily the burden to prove the violation of policy condition would lie with the insurance company. The Insurance Company, though took a plea, that the driver did not

have valid driving license, apparently failed to adduce any legal evidence, to show that the driver of the offending vehicle did not have any valid driving

license, and as such the Insurance Company failed to discharge itâ??s burden to avoid the liability. Evidently, insurance coverage of the offending

vehicle was not in dispute. Since the only plea raised by the insurance company that the driver did not have valid driving license, had fallen through, the

insurance company cannot avoid the liability to satisfy the award. The only question raised being answered as above, no further discussion, in my

considered view, is necessary for disposal of this appeal.

8. Mr. S.C. Biswas, learned counsel for the respondent/claimant submits that the awardmade by the Tribunal on account of funeral expenses and loss

of estate, were inadequate and urged for enhancement. Learned counsel for the appellant, vehemently resisting the above submission, contends, that in

absence of cross appeal or cross objection, compensation cannot be enhanced in an appeal filed by the insurer on the ground of inadequacy of

compensation. Mr. Biswas, learned counsel for the respondent/claimant submits, that even in absence of cross appeal, court can enhance

compensation.

9. The Apex Court in Ranjana Prakash And Ors vs The Divisional Manager And Anr reported in (2011) 14 SCC 639 dealing with the scope of

enhancement of compensation, in the appeal filed by Insurance Company, in absence of cross appeal held in para-6 & 8 as under:

â??6. We are of the view that High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not

challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of future prospects and add 30% to the annual income of

the deceased. But the claimants were not aggrieved by Rs.23,134/- being taken as the monthly income. There was therefore no need for them to

challenge the award of the Tribunal. But where in an appeal filed by the owner/ insurer, if the High Court proposes to reduce the compensation

awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or

omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation. Therefore, in an

appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason,

30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that claimants did not independently

challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an

appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of

any cross-appeal or cross-objections.â??

â??8.Â Â Â Â Â Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for

the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is

higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by

the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High

Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. The High Court cannot

obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by

the claimants seeking enhancement of compensation.â??

10. What therefore transpires from the ratio laid down by the Apex Court in Ranjana Prakash (supra) is that in an appeal filed by the owner or insurer,

for reduction of compensation or setting aside the award, compensation cannot be enhanced in absence of cross objection or appeal, except where,

the learned Tribunal committed any illegality and/or no compensation was awarded on any heads, which the Tribunal ought to have awarded under the

law. Where Tribunal awarded some compensation, such compensation cannot be enhanced on the ground of inadequacy, in an appeal filed by the

insurer. The claimant, of course, can defend the award by pointing out any illegalities or deficiency in the award, but cannot get enhancement in

absence of appeal or cross objection. In the instant case, learned counsel for the claimant/respondent has sought for enhancement of compensation granted by the Tribunal on the ground of inadequacy, which is not permissible in view of the ratio laid down by the Apex Court in Ranjana Prakash.

Therefore, I am unable to accept the submission made by the learned counsel for the claimant for enhancement of the award on the facts and

circumstances of the case, without any cross objection or counter appeal. Be that as it may, since the question raised in this appeal by the insurance

company with regard to validity of the driving license is answered, and plea raised by the insurance company is found without merit, the appeal

deserves to be dismissed. Accordingly, the appeal is dismissed.

11. The statutory deposit made by the appellant shall be returned.

12. Send back the LCR.

