
(2008) 06 J&K CK 0006
In the Jammu And Kashmir High Court

National Insurance Company	Vs	APPELLANT
Haseera Begum and Others		RESPONDENT

Date of Decision : 03-06-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 170

Citation : (2008) 3 JKJ 57

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Judgement

Mansoor Ahmad Mir, J.—Insurer-appellant has challenged the award and judgment dated 30th of April, 2007 passed by Motor Accident

Claims Tribunal, Budgam, in a claim petition titled Haseera Begum and Ors. v. National Insurance Co. and Ors. for short the impugned award, on

the grounds taken in the memo of appeal.

2. Mr. Mohammad Shafi Shaheen, Advocate, filed power of attorney on behalf of respondents 1 to 6. thereafter has not caused his appearance.

There was no representation on behalf of other respondents despite service. Accordingly, respondents 1 to 7,9 and 10 are set exparte.

3. The claimants-respondents 1 to 7 filed a claim petition before the Motor Accident Claims Tribunal, Budgam, on the grounds that Sh. Ghulam

Mohammad Paswal deceased husband of respondent No. 1 and father of respondents 2 to 7 became the victim of vehicular accident which was

caused by Ghulam Ahmad Mir, driver-respondent No. 10 while driving the Bus bearing registration No. 6787/JK01 rashly and negligently on 20th

of December, 2000, at Chaksheera, Budgam. The deceased sustained injuries and succumbed to injuries in the hospital.

4. Insurer-appellant resisted the claim petition on the ground that driver-respondent No. 10 was not having valid/effective driving licence and

denied the liability. Other respondents also resisted the petitioner. Following issues came to be framed:

1. Whether the deceased Gh. Mohd. Died in vehicular accident caused by vehicle No. 6787-JKO on 29.12.00? OPP

2. Whether the said vehicle was driven by Resp. No. 4 rashly and negligently, owned by respondent No. 2 and insured by resp. No. 1 at the time

of accident? OPP

3. Whether respondents are jointly/severally liable to pay compensation to petitioners as defendants of the deceased. If so what is their respective

liability? OPP

4. In case issue No. 1 to 3 are answered in affirmative what is the amount of compensation payable to petitioners and how? OPP

5. In case issue No. 1 is answered in affirmative whether the vehicle was not being driven by a licenced driver and did not have a fitness certificate

at the time of accident, if so, what is its effect on petitioner's claim of compensation? OPR-I

6. Relief.

5. Respondent No. 2 besides examining himself examined, Assadullah Kumar, Ghulam Hassan Deenda, Dr. Farooq Hussain Shah in support of

their claim.

6. The evidence of the claimants was closed vide order dated 7th of February, 2007. Respondents particularly, appellant-insurer has not led any

evidence in support of the claim except examining Mushtaq Ahmad, Legal Assistant, National Insurance Company. On the statement of learned

Counsel for the insurer-appellant, its evidence came to be closed. Respondents were set exparte during the pendency of the claim petition.

Issue Nos. 1 and 2:

7. Lone witness, Mushtaq Ahmad, examined by the appellant-insurer has stated that vehicle was insured and driver Ghulam Ahmad Mir was

having valid licence and was competent to drive offending vehicle in terms of the verification report of the RTO and also admitted the factum of

insurance.

8. In the given circumstances of the case, the evidence of the petitioner to the effect that driver Ghulam Ahmad Mir has driven offending vehicle

rashly and negligently and has caused the accident has remained un-rebutted. Thus the finding returned by the Tribunal viz-a-viz issue Nos. 1 and 2

needs no interference.

Issue Nos. 3 and 4:

9. There is ample evidence on the file that deceased was labourer by profession and was pulling/using handcart. He was earning Rs. 400/- to Rs.

500/- per day. Besides that he was Farmer by profession and was cultivating his land. By guess work it can be safely held that deceased was

earning Rs. 6000/-per month, would have spent at least one third for his personal expenses thereby dependents-claimants-respondents 1 to 7

stand deprived of source of dependency to the tune of Rs. 4000/- per month. The age of the deceased as pleaded and proved was 40 years and it

has also not been disputed by the learned Counsel for the insurer-appellant. Keeping in view the schedule appended with the Motor Vehicles Act,

the multiplier applicable was 15. Thus, petitioners are entitled to Rs. $4000 \times 12 \times 15 =$ Rs. 7.20 lacs.

10. In the given circumstances, the Tribunal has rightly awarded Rs. 7.20 lacs and finding returned by the Tribunal needs no interference.

Now, question is who is to be saddled with the liability?

11. This issue is to be decided while returning finding on issue No. 5. The onus to prove this issue was on appellant/insurer. It has examined only

one witness who has categorically deposed that driver was competent to drive the offending vehicle and he was having valid and effective driving

licence to drive the passenger vehicle. There is not an iota of evidence suggesting the fact that driver was not having licence to drive offending

vehicle or owner has committed any willful breach which would absolve the appellant from its liability. There is also not an iota of evidence on the

file that driver was competent to drive one type of vehicle but was driving another kind of vehicle and that was the cause of accident.

12. The apex court also in a leading case titled National Insurance Co. Ltd. Vs. Swaran Singh and Others, held that if driver is competent to drive

one type of vehicle and was driving another type of vehicle at the time of accident, the insurer has to prove by leading evidence before the court

that, it was the main or contributory cause of accident, It is profitable to reproduce a portion of para 84 of the said judgment, so far it is relevant

for the present, hereunder:

...In each case on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of

vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused

solely because of some other unforeseen or intervening causes like mechanical failure and similar other causes having no nexus with driver not

possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving

licence.

13. In Swaran Singh's case (supra), the apex court has laid down test when and how insurer can avoid liability. It is profitable to reproduce para

105 (iii)(iv) and (vi) herein:

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2) (a)(ii) of

Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving

licence or disqualification of the driver for driving at the relevant time, are not in themselves defenses available to the insurer against either the

insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to

exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not

disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said

proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by

the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the

said breach or breaches on the condition of driving licence is/are so fundamental

as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured u/s 149(2) of the Act.

14. As discussed above, there is nothing on the file to show that the insurer has pleaded and proved before the Tribunal that the insured was guilty of negligence and has committed any willful breach. Applying the test laid down by the apex court in the judgment supra, the appellant cannot avoid its liability.

15. For the reasons stated hereinbefore, the finding returned on issue No. 4 is maintained. It is worthwhile to mention herein that insurer-appellant had moved an application u/s 170 of the Motor Vehicles Act, whereby it has sought permission to contest the claim petition on all grounds available to the driver and owner but later on it neither pressed that application nor led any evidence. Thus, the appellant is not within its rights to challenge the impugned award on the adequacy of compensation. But while going through the impugned award, it appears that the rate of interest is not correctly award. I deem it proper to reduce the rate of interest from 9% to 6% and modify the award accordingly.

16. It appears that learned Tribunal while deciding the issue No. 3 has fallen in error while making calculations. The Tribunal has wrongly given the break up in last para of the impugned award and has held that claimants are entitled to Rs. 7.80 lacks as compensation.

17. The amount of compensation to be paid to the victims of vehicular accident is not the estate of the deceased but is the source of dependency, loss of future income, love and affection of the victims. Thus, I am of the considered view that all the claimants are entitled to compensation in equal shares. The share of minors be kept in fixed deposit till they attain the age of majority.

Tribunal has made wrong calculations and came to the conclusion and held that claimants are entitled to Rs. 7.80 lacs, which is not factually correct, as discussed above. The claimants are only entitled to Rs. 7.20 lacs with 6% interest from the date of claim petition till its final realization minus the amount of interim award. The impugned award is, accordingly, modified as indicated above.

Registry to send down the record along with a copy of this judgment.