

(2018) 10 CAL CK 0096

In the Calcutta High Court

Case No : C.A.N. 5777 Of 2017, F.M.A.T. 543 Of 2017

National Insurance Company Limited @APPELLANT@Hash Smt. Dipannita Acharya & Ors

Date of Decision : 12-10-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 166, 174
Indian Penal Code, 1860 — Section 297, 304A
Constitution of India, 1950 — Article 142

Citation : (2018) 10 CAL CK 0096

Hon'ble Judges : Harish Tandon, J;Shekhar B. Saraf, J

Bench : Division Bench

Advocate : Rabindra Nath Dutta, Shibani Das, Rajesh Singh

Final Decision : Dismissed

Judgement

Shekhar B. Saraf, J.

1. This is an application arising out of an appeal against an award dated 22nd March, 2017 passed by the Learned Judge, Motor Accident Claims

Tribunal, 3rd Court, Barasat, North 24 Parganas in MAC Case No. 308 of 2002 under Section 166 of the Motor Vehicles Act, 1988. By consent of

parties the stay application and the appeal were taken up together for hearing. The appellant herein is the National Insurance Company, the insurer of

the offending vehicle that resulted in the death of the husband of the petitioner/respondent no. 1. The other claimants are the minor son and mother of

the deceased.

2. The chronological events leading to this appeal are as follows:

a. On August 3, 2001, at around 6.30 a.m. in the morning the victim Tarun Acharya and his two companions namely, Sajal Das and Debu Singh were

travelling in an ambassador car bearing No. WB â?" 02/1605 through Jessore

Road from Habra to Dumdum Cantonment. While they were on the road a lorry bearing no. WB-25/0373 collided head on with the ambassador, as a result of which, the victim sustained fatal injuries all over his body.

He was immediately taken to the Barasat District Hospital where he succumbed to his injuries.

b. In connection with the aforesaid accident a police case was registered vide Airport P.S. Case No. 107 dated August 3, 2001 under Section

297/304A of the Indian Penal Code against the driver of the offending vehicle.

c. The owner of the vehicle did not contest the case despite service of summons and accordingly the case proceeded ex parte against him. The

appellant herein, the opposite party no. 2 before the Trial Court, contested the case by filing written statement and by leading oral evidence.

d. The Tribunal after hearing all the parties allowed the claim of the claimants and granted an award of Rs. 15,93,500/- along with interest at the rate

of six percent per annum from the date of filing of the claim application.

e. The insurance company thereafter has filed this appeal assailing the impugned judgment of the Tribunal.

3. Mr. Rajesh Singh, counsel on behalf of the appellant primarily put forth his submissions on the proposition that if the driver of the vehicle did not

possess a valid driving licence the insurance company could not be made liable to pay the compensation/ damages. In support of his case, he relied on

four Supreme Court judgments of Oriental Insurance Co. Ltd. â"v- Syed Ibrahim and Others reported in 2007 (4) T.A.C. 385 (S.C.) [Coram: Dr.

Arijit Pasayat and Lokeshwar Singh Panta, JJ.]; Sardari and Others â"v- Sushil Kumar and Others reported in 2008 (2) T.A.C. 369 (S.C.) [Coram:

S.B. Sinha and V.S. Sirpurkar, JJ.]; Ram Babu Tiwari â"v- United India Insurance Co. Ltd. and Others reported in 2008 (3) T.A.C. 769 (S.C.)

[Coram: S.B. Sinha and Cyriac Joseph, JJ.]; Prem Kumari and Others â"v- Prahlad Dev and Others reported in 2008 (1) T.A.C. 803 (S.C.) [Coram:

Dr. Arijit Pasayat and P. Sathasivam, JJ.] to urge that in cases where the driver is not having a valid licence, the same would amount to willful

violation of the terms and conditions of the policy resulting in the insurance company being absolved of its liability to pay the victim.

4. Per contra, counsel for the petitioner submitted that the defence provided to the insurance company under Section 149(2) of the Motor Vehicles

Act, 1988 does not absolve the insurance company from making the payment to the claimants. In fact, he submitted that the liability of the insurance company to pay the victim very much remains and the defences under Section 149(2) only allow the insurance company to seek the reimbursement of the amount paid to the victim from the owner of the offending vehicle. He relied on a judgment in *National Insurance Co. Ltd. v. Swaran Singh* and Ors. reported in (2004) 3 SCC 297 [Coram: V. N. Khare, CJI, D. M. Dharmadhikari and S. B. Sinha, JJ.] to support his above submission. He further submitted that the Supreme Court in a very recent judgment in *Shamanna and another v. Divisional Manager Oriental Insurance Co. Ltd.* And others reported in AIR 2018 (SC) 3726 [Coram: Ranjan Gogoi and Mrs. R. Banumathi, JJ.] has categorically stated that the decision in *Swaran Singh* (supra) holds the field and therefore the insurance company is required to first pay the victims and thereafter recover the same from the owner of the offending vehicle.

5. On an examination of the judgments cited by both the parties, We are of the view that the High Court is required to follow the most recent judgment of the Supreme Court on the proposition before it. In *Shamanna and another* (supra) the Supreme Court upon examination of several judgments has clearly held that the larger bench judgment in *Swaran Singh* (supra) is the judgment to be followed and has held that even in cases where the insurance company is able to put up a good defence under Section 149(2), it is upon the insurance company to first pay the claimants of the victim and thereafter recover from the owner of the offending vehicle in question. The relevant paragraphs are delineated below:

11. In the present case, to deny the benefit of 'pay and recover', what seems to have substantially weighed with the High Court is the reference to larger Bench made by the two- Judge Bench in *National Insurance Co. Ltd. v. Parvathneni and another* 92009) 8 SCC 785 which doubted the correctness of the decisions which in exercise of jurisdiction under Article 142 of the Constitution of India directing insurance company to pay the compensation amount even though insurance company has no liability to pay. In *Parvathneni* case, the Supreme Court pointed out that Article 142 of the Constitution of India does not cover such type of cases and that 'if the insurance company has no liability to pay at all, then, it cannot be

compelled by order of the court in exercise of its jurisdiction under Article 142 of the Constitution of India to pay the compensation amount and later

on recover it from the owner of the vehicle. The above reference in Parvathneni case has been disposed of on 17.09.2013 by the three-Judges

Bench keeping the questions of law open to be decided in an appropriate case.

12. Since the reference to the larger bench in parvathneni case has been disposed of by keeping the questions of law open to be decided in an

appropriate case, presently the decision in Swaran Singh case (AIR 2004 SC 1531) followed in Laxmi Narain Dhut (AIR 2007 SC 1563) and other

cases hold the field. The award passed by the Tribunal directing the insurance company to pay the compensation amount awarded to the claimants

and thereafter, recover the same from the owner of the vehicle in question, is in accordance with the judgment passed by this Court in Swaran Singh

and Laxmi Narain Dhut cases. While so, in our view, the High Court ought not to have interfered with the award passed by the Tribunal directing the

first respondent to pay and recover from the owner of the vehicle. The impugned judgment of the High Court exonerating the insurance company

from its liability and directing the claimants to recover the compensation from the owner of the vehicle is set aside and the award passed by the

Tribunal is restored.

13. So far as the recovery of the amount from the owner of the vehicle, the insurance company shall recover as held in the decision in Oriental

Insurance Co. Ltd. v. Nanjappan and others (2004) 13 SCC 224: (AIR 2004 SC 1630) where this Court held that "that for the purpose of

recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing

Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against

the owner and in favour of the insurer."

6. The larger bench judgment in Swaran Singh (supra) is clearly the law of the land. The ratio enumerated in the said judgment has been summarized

at paragraph 110 of the said judgment that is delineated below:

"110. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of

vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all

vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

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

Section 149, has 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 defences available to the insurer against either the insured or the

third parties. To avoid its liability towards the 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 a duly licensed driver or one who was not disqualified

to drive at the relevant time.

(iv) Insurance companies, 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 wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and

circumstances of each case.

(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 the 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 insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents

involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted

to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the

claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to

decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and

insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the

same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in

accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer

is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award

of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be

recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The

certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails

to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies

mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to

by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in

cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims.â??

7. The judgment at paragraph 110(x) clearly states that once the Tribunal has arrived at a conclusion that the insurer has satisfactorily proved its

defence in accordance with the provisions of Section 149(2), the Tribunal can direct the insurer to pay to the third party and thereafter seek

reimbursement of the same from the insured person. The Supreme Court clarified that the money found due to the insurer from the insured will be

recoverable on a certificate issued by the Tribunal to the collector in the same manner as under Section 174 of the Act as arrears of land revenue.

8. In view of the above two judgments in Swaran Singh (supra) and Shamanna (supra), the issue raised by counsel on behalf of the appellants is no

longer res integra. The judgment cited on behalf of the appellants are distinguishable on facts and do not overrule the ratio of Swaran Singh (supra)

and are accordingly having no precedential value in the present case.

9. Furthermore, on a detailed examination of the impugned order it is revealed that the Tribunal had come to a finding that the insurance company had

failed to prove with cogent evidence that the driving licence used by the driver of the offending vehicle was fake and the same was within the

knowledge of the owner of the offending vehicle.

The Tribunal held that in absence of specific evidence against the owner of the offending vehicle, the insurance company could not disown its liability

to pay compensation to the dependents to the victim who had died in the road accident. The Tribunal further held that the offending vehicle was well

within the coverage of the insurance policy and accordingly the insurance company was liable to pay compensation to the claimants on account of

death of the deceased. I find it surprising that the appellants have not challenged the above findings during the arguments made before us. The

witnesses who deposed on behalf of the claimant in unequivocal terms stated not

only the age of the deceased but also produced the photocopy of the driving licence which was marked Exbt 7. The Exbt 7 was received in evidence without any objection from the insurance company and, therefore, it is not open to the insurance company to take a stand that the deceased was not having the valid driving licence.

Furthermore, the plea of fake driving licence though taken as a defense in the written statement yet no corroborative evidence was produced by the insurance company before the Tribunal. The onus lies on the insurance company to prove that the driving licence was fake and having failed to discharge such onus the tribunal did not commit any error in discarding such defense. The Tribunal has relied upon the income tax return filed by the deceased for the preceding financial years and arrived at the definite conclusion that the income of the deceased was Rs. 11,000/- per month. We also do not find the modalities of calculation adopted by the Tribunal in determining the compensation; even otherwise there is no challenge thrown by the insurance company over the same before us. On a closer examination of the impugned order it is clear that the witness on behalf of the insurance company was unable to substantiate the case of the licence being a fake one. One need not go in great detail on this aspect as we find no reason to interfere with the finding of the Tribunal that is a very much plausible and correct finding and has been arrived at upon examination of the testimony given by the witness on behalf of the appellants.

10. In view of the above, I am of the view that the present appeal is without any substance and the assailed order does not require any interference.

11. Accordingly, the application and appeal are dismissed without any order as to costs.

12. Since the entire awarded sum together with interest has already been deposited in terms of the order passed in the instant appeal, liberty is granted to respondents to apply before the Registrar General, High Court for withdrawal of the amount without furnishing any security and if such prayer is made, the Registrar General is directed to see that the amount is disbursed to the respondents within two weeks with the date of such request.

13. Urgent certified website copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.