

(2017) 03 TP CK 0015
In the Tripura High Court
Case No : 25 of 2015

National Insurance Company Limited, represented by its
Divisional Manager, Agartala Divisional Office

APPELLANT

Vs

Smti. Ashalata Bhowmik, wife of Sri Haripada Bhowmik, &
Ors.

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

[Motor Vehicles Act, 1988](#), [Section 173](#),
[Section 173](#), [Section 163A](#), [Section 163A](#), [Section 166](#), [Section 166](#) - Appeals - Special provisions as to payment of
compensation on structured formula basis - Application for compensation

Citation : (2017) 03 TP CK 0015

Hon'ble Judges : S. Talapatra

Bench : Single Bench

Advocate : S. Lodh, Suman Bhattacharji

Judgement

1. This is an appeal under Section 173 of the Motor Vehicles Act from the judgment and award dated 25.11.2014 delivered in T.S.(MAC) 382 of 2012 by the Motor Accident Claims Tribunal, West Tripura, Agartala, Court No.1.

2. Without projecting any direct challenge against the basic fact of the accident, the appellant has raised two pronged objections viz.,

(i) When the accident occurred for negligence of the insured being the owner of the vehicle can he be entitled to get compensation under Section 166 of the MV Act ?

(ii) Whether the insurer in such circumstances can be fastened with the liability to pay the compensation, if any?

3. It has not been disputed by the appellant that on 20.05.2012 at about 7.30 p.m. in the evening, while one Dilip Bhowmik was returning home from Kathaltali by driving his vehicle bearing No TR-01-U-0530, he met an accident on the bye-

pass under Amtali Police Station. From the said accident, he sustained grievous injuries on his person. He was rushed to the TMC & Dr. B.R. Ambedkar Memorial Teaching Hospital, Hapania, but from there he was referred to the AGMC & GBP Hospital, Agartala. The Medical Officer of that hospital declared him dead. At the time of accident, the deceased was aged about 43 years and he was carrying on business of coal. His monthly income has been asserted to be Rs.15,000/- per month. The dependants and the legal heirs filed the claim petition under Section 166 of the Motor Vehicles Act claiming Rs.68,15,000/- as the compensation from the insurer, the appellant herein. The appellant by filing the written statement seriously disputed the claim. On the face of such objection, the following issues were framed by the tribunal for adjudication of the claim:

"(1) Did Dilip Bhowmik sustain any injury on 20.05.2012 at about 7.30 near the Agartala Railway Bridge (Amtali Bypass) in a Road Traffic Accident involving the Car bearing no.TR-01-U-0530 (Indica) driven by him being the owner resulting in his death the same day?

(2) Are the claimants entitled to be compensated under the provisions of the M.V. Act, 1988? If so, to what extent and who shall be liable to pay the same?"

4. The issue No.1, as reproduced, has been answered in favour of the claimant-respondent. In the appeal that finding has not been questioned at all. But the finding of the tribunal in respect of the issue No.2, as reproduced, has been seriously challenged. While deciding the issue No.2, the tribunal has observed as under:

"It is to be decided now whether the Insurance Company, the sole O.P. is liable to pay the compensation. On the point, in the cross examination of the claimant no.1, it is suggested that as her son was the owner-cum-driver of the car, they are not entitled to get any compensation. In this regard, Sri Joydeep Ghosh, Administrative Officer of the National Insurance Company Ltd., Agartala adduced his evidence reiterating the same. In the cross examination, he has admitted that the policy in question was a package policy in the name of Dilip Bhowmik valid from 24.08.2011 to 23.08.2012. This is also evident from the policy itself proved by the claimants marked Exbt.2.

On the point, learned Counsel for the claimants has referred to a decision of the Apex Court rendered in National Insurance Company Ltd. Vrs. Bala Krishnan and another reported as (2013) 1 SCC 731 and a decision of the Sikkim High Court between the Oriental Insurance Company Ltd. And Smti Madansha Sherpa and others reported as 2014(2) T.A.C. 826 (Sikkim). The Judgment of the Hon"ble Apex Court is a detailed one in which different Judgments namely, Asha Ranicas, Jhuma Saha case, Laxmi Narain Dhut case and Meena Bariyal" case are discussed where the Insurance Policies were Statutory policy/Act policy. The Hon"ble Apex Court from para 19 undertook discussion as to the position of insurance when the policy is a comprehensive policy which is also called package policy. After making elaborate discussion down the paragraphs, the Apex Court

came to the following findings:

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 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 thirdparty risk on 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 Bhagyalakshmi 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 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.

27. In view of the aforesaid legal position, the question that emerges for consideration is whether in the case at hand, the policy is an "Act Policy" or "comprehensive/package policy"? There has been no discussion either by the Tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a "comprehensive policy" but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car.

28. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the Tribunal as regards the likability of the insurer and remit the matter to the Tribunal to scrutinise the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "comprehensive/package policy", the liability would be fastened on the insurer. As far as other findings recorded by the Tribunal and affirmed by the High Court are concerned, they remain undisturbed.

The Hon''ble Sikkim High Court following the ratio of the aforesaid Judgment in 2014(2) T.A.C. 826 (Sikkim) observed as follows:

20. This Court, in the case of The Branch Manager, New India Assurance Co. Ltd. (supra) has also relied upon its earlier judgment on the same point, delivered in the case of Senior Branch Manager, National Insurance Co. Ltd., Gangtok v. Namita Dixit reported in AIR 2010 Sikkim 50, the relevant portion of which has also been quoted in paragraph 11 of the judgment. This Court, after considering all the facts and circumstances of the case, various judgments of the Hon''ble Apex Court and the terms and conditions of the insurance policy, particularly, the "package policy" took a view that deceased owner-cum-driver is fully covered

under the policy. After considering the facts and circumstances of the present case, I find that the present case is fully covered by earlier judgment of this Court in the case of The Branch Manager, New India Assurance Co. Ltd. (supra) and also the judgment of the Hon'ble the Apex Court delivered in the case of National Insurance Company Ltd. (supra).

In the case in hand, it is not in dispute that the policy is a package policy. That being so, in view of the ratio of the aforesaid Judgments particularly that of the Hon'ble Apex Court, it is to be concluded that the O.P. is liable to satisfy the award. Accordingly, it is ordered that the awarded amount shall be paid by the National Insurance Company Ltd., Agartala Branch."

5. Mr. S. Lodh, learned counsel appearing for the appellant has seriously criticised the said finding contending that the issue No.2 as produced, is required to be split into two parts viz.,

(i) Whether the claim petition under Section 166 is maintainable by the dependent and the legal heirs of the deceased? and

(ii) Whether the award as ascertained by the tribunal is liable to be paid by the appellant-insurer?

6. According to Mr. Lodh, learned counsel who represents the appellant here, the claim petition under Section 166 of the MV Act cannot be maintained inasmuch as the negligence for the accident is squarely attributable to the petitioner. From the evidence of Smt. Ashalata Bhowmik, the mother of the deceased, it would not be apparent that how the accident took place. Her testimony is completely silent about that aspect. Even PW-2, Smt. Mahua Nath, unfortunate wife of the deceased did not state anything about how the accident had taken place. It is true that Sri Joydeep Ghosh [DW-1] representing the insurer in his cross-examination has clearly admitted that the policy issued by the appellant in respect of the deceased insured for the period from 24.08.2011- 23.08.2012 was a package policy and the same was valid at the time when the accident occurred i.e., 20.05.2012.

7. In Oriental Insurance Company Limited vs. Meena Variyal & Ors. reported in AIR 2007 SC 1609, it has been held by the apex court having reference to Minu B. Mehta & Anr. vs. Balkrishan Ramchandra Nayan & Anr. reported in (1977) 2 S.C.R. 886, that:

".....whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. On the facts in that case, their Lordships found that the appeal was liable to be dismissed subject to certain directions issued therein. But their Lordships, in the light of the fact that the High Court had discussed the law on the question and it was of some importance, felt that it was necessary to state the position in law. Noticing that the liability of the owner of the car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort,

the court discussed the scheme of the Act of 1939 and the law on the question. Regarding the view of the High Court that it was not necessary to prove negligence, the court held:

"The reasoning of the two learned judges is unacceptable as it is opposed to basic principles of the owner's liability for negligence of his servant and is based on a complete misreading of the provisions of Chapter VIII of the Act. The High Court's zeal for what it considered to be protection of public good has misled it into adopting a course which is nothing short of legislation."

Their Lordships also noticed that proof of negligence remained the lynch pin to recover compensation. Their Lordships concluded by saying, "We concluded by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case."

It has been further held in *Meena Variyal* (supra) that:

"We think that the law laid down in *Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr.* (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force⁴ that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim under subsection (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

[Emphasis added]

Now the question that falls for is that if for negligent driving the owner of the vehicle who was driving the vehicle when the vehicle met the accident, can any award be passed under Section 166 of the MV Act, saddling the liability of payment to the insurer?

8. In *Oriental Insurance Company Limited vs. Jhuma Saha and Others* reported

in (2007) 9 SCC 263, that point fell for consideration of the apex court. The apex court has enunciated the law as under:

"10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving, the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

11. Liability of the insurer-Company is to the extent of indemnification of the insured against the respondent or a injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of Motor Vehicle Act, the question of the insurer being liable to indemnify insured, therefore, does not arise.

12. In *Dhanraj v. New India Assurance Co. Ltd. & Anr.*, [2004] 8 SCC 553, it is stated as follows :

"8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

xx xx xx xx

10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. "Under the heading "Own damage", the words "premium on vehicle and nonelectrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is not such insurance."

13. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147(b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

[Emphasis added]

It is unambiguously held that the owner of the vehicle when is to be blamed for the accident and no other motor vehicle is involved in the accident then his heirs cannot claim any compensation.

9. The principle as laid down in *Jhuma Saha (supra)*, is that a person cannot be a plaintiff and the defendant at the same time. The legal heirs of the owner

therefore cannot file a claim against the insurance company.

10. Mr. Lodh, learned counsel appearing for the appellant has referred a decision of this court in Suchitra Choudhury(Dey) and Another vs. Naresh Debbarma and Another reported in (2015) 1 TLR 459, where a reference has been made to Oriental Insurance Co. Ltd. Vs. Rajani Devi and Others reported in 2008 ACJ 1441, where it has been enunciated inter alia that:

"The decision further held that the question is no longer res integra. The liability under section 163A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of section 163A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and, therefore, he would step into the shoes of the owner of the motorbike."

It has been further held that:

".....If it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of section 163A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under section 163A of the MVA."

11. Mr. S. Lodh, learned counsel appearing for the appellant has submitted that if a conjoint reading of the decisions are carried out it will be crystal clear that when the accident occurred for fault or no fault liability of the owner of the vehicle when he was driving the same, then neither the owner of the vehicle nor his legal heirs can claim any compensation for fault liability, even nor can they claim under no fault liability.

12. Mr. Suman Bhattacharji, learned counsel appearing for the respondents has however made a serious attempt to distinguish the fact of the cases referred by Mr. Lodh, learned counsel appearing for the appellant. He has submitted that when the vehicle is covered by a package policy where the premium has been separately paid for the personal accident of the owner cum driver of the said vehicle, the insurance company cannot shy away from their liability. For that purpose, he has referred to the insurance policy which is on the record and the statement of DW-1 as indicated earlier. On scrutiny, it is found that the premium was paid for PA of the owner-cumdriver, however the liability has been shown limited to Rs.2,00,000/-.

13. Having appreciated the rival contentions advanced by the learned counsel for the parties, this court does not have any hesitation to hold that the claim petition

under Section 166 of the MV Act cannot be maintained by the legal heirs or dependants of the owner-cum-driver inasmuch as no other vehicle was involved in the said accident and the claimant-respondents did not state anything how the said accident had taken place. Therefore, the irresistible inference that is to be drawn is that the accident had taken place for negligent driving of the deceased owner. But in view of the law laid down by the Supreme Court, fault or no fault liability, in both the cases the legal heirs will have no right to claim compensation from the insurer, except when the indemnification is extended to the personal accident of the owner-cum-driver. As it has been established by the claimant-respondents that the premium was paid for the personal accident the insurance company is liable to pay the said compensation, even though it is limited to Rs.2,00,000/- to the claimant-respondents. There is no challenge, however, against the determination of the compensation.

14. Therefore even after holding that the claim petition under Section 166 or 163A of the Motor Vehicles Act cannot be maintained by the legal heirs of the owner-cum-driver who was driving the vehicle at the relevant point of time as there was no involvement of the other vehicle or other causes in the said accident, the insurance company shall pay the compensation as assessed by the tribunal below in view of the indemnification as extended on payment of the due premium for personal accident of the driver-cum-owner. This direction has been made in the circumstances of the case and for averting failure of justice. But this shall not be treated as the precedent for purpose of having jurisdiction for setting a claim petition in the similar circumstances under Section 166 and 163A of the Motor Vehicles Act for adjudication. Clearly, the tribunal will have no jurisdiction. For such claim, the law has created the competent forum. Subject to what has been observed, this appeal is disposed of.

There shall be no order as to costs.

Send down the LCRs forthwith.