
(2020) 06 J&K CK 0041

In the Jammu And Kashmir High Court

Case No : CMAM No. 31 Of 2008, IA No. 01, 129 Of 2008

National Insurance Company Ltd

APPELLANT

Vs

Tsewang Dorjay And Others

RESPONDENT

Date of Decision : 19-06-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 168

Citation : (2020) 06 J&K CK 0041

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : J.A. Kawoosa, Sheikh Umar

Final Decision : Dismissed

Judgement

Sanjay Dhar, J

1. The instant appeal has been filed by the appellant against the Award dated 31.03.2007 passed by the Motor Accident Claims Tribunal, Leh Ladakh (hereinafter referred to as 'the Tribunal'). Before coming to the issues involved in the instant appeal, let me give a brief background of the facts leading to filing of the appeal.

1. On 22.07.2005, the deceased, namely, Norzin Angmo was travelling in a Tipper bearing Registration No. JK10-2610 towards Pullo Nobra. On reaching near North Pullo Nobra, the vehicle met with an accident, resulting in instant death of the deceased. The claimants happen to be the parents of the deceased, who was aged about 9 years old at the time of her death.

2. The claimants filed a claim petition before the Tribunal, claiming compensation in the amount of Rs. 25,18000/- (Rupees Twenty Five Lacs and Eighteen Thousand) from the respondents. Respondent No. 1 in the claim petition happens to be the driver, respondent No. 2 happens to be the owner and respondent No. 3 happens to be the insurer of the offending vehicle. The claim petition was contested before the Tribunal by the respondent Nos. 1 and 3, i.e., the driver and

the insurer, whereas respondent No. 2, the owner of the offending vehicle, chose not to contest the claim petition and he was set ex-parte.

3. After the trial of the case, the Tribunal came to the conclusion that the deceased was travelling in the offending vehicle as gratuitous passenger and that the accident did take place on account of rash and negligent driving of the driver of the offending vehicle. It was also established that respondent No. 2 before the Tribunal happened to be the owner, whereas respondent No. 3 happened to be the insurer of the offending vehicle at the time of the accident.

4. The Tribunal vide the impugned Award, awarded an amount of ₹ 1.80Lacs as compensation in favour of the claimants and against the respondents along with interest @ 7.5% per annum from the date of filing of the claim petition till the realization of the amount. It was further directed that the awarded amount, in the first instance, shall be satisfied by the insurer with a right to recover the same from the owner. The insurance company felt aggrieved of the impugned award and filed the instant appeal.

5. The only ground that has been urged by the insurance company before this Court is that in a case, where it has been established that the deceased was travelling as a gratuitous passenger in a load carrier, an order of pay and recover cannot be passed against the insurance company. The appellant has not urged any other point before this Court either in the appeal or during the course of arguments,

6. I have heard learned counsel for the appellant and learned counsel for the claimants. I have also gone through the grounds of appeal, the impugned award and the record of the Tribunal.

7. There is no dispute with regard to the findings of the Tribunal that the deceased was travelling in the offending vehicle at the time of the accident, that the accident took place on account of rash and negligent driving of the vehicle by its driver and that the vehicle at the time of the accident was owned by the respondent No. 4 (herein). It is also an admitted fact that the offending vehicle, at the time of the accident, was covered by insurance policy issued by the appellant (herein). The finding of the Tribunal that the deceased was travelling as a gratuitous passenger in the offending vehicle, which was a load carrier, is also not in dispute. The quantum of compensation awarded by the Tribunal in favour of the claimants vide the aforesaid impugned award, has also not been challenged. The only dispute is with regard to the order made by the Tribunal, whereby it has directed that the awarded amount shall be, in the first instance, be paid by the insurance company and thereafter, the same shall be recoverable by the insurance company from the insured.

8. Learned counsel for the appellant has vehemently argued that the direction with regard to pay and recover can be made only in a case, where the driving licence of the driver of the offending vehicle is shown to be invalid or fake. According to the learned counsel, in a case where the deceased or injured is

shown to be a gratuitous passenger, no direction for pay and recover can be passed. In support of his argument, learned counsel for the appellant has referred to the judgment of the Hon'ble Supreme Court rendered in case titled, "National Insurance Company Vs. Roshan Lal and Another, reported as (2017) 4 SCC 803.

9. So far as the issue with regard to passing of a direction of pay and recover in the cases where the deceased/injured were found to be travelling in a load carrier as gratuitous passengers is concerned, the same has been dealt with by the Hon'ble Supreme Court in the case titled, " M/S National Insurance Company Ltd. Vs. Baljit Kaur and others, reported as (2004) 2 SCC 1". Para-21 of the aforesaid judgment is relevant to the context and the same is reproduced as under:-

"21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the 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. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the tribunal in such a proceeding."

10. The aforesaid judgment of the Hon'ble Supreme Court has been consistently followed in several other subsequent judgments including the one in the case titled, "Manuara Khatun and others Vs. Rajesh Kumar Singh and others, reported as 2017 (4) SCC 796". In the said case, the Hon'ble Supreme Court took note of the observations made by the said Court in the case of "National Insurance Company Ltd. Vs. Saju P. Paul, reported as 2013 (2) SCC 41", wherein the Hon'ble Apex Court had held on the facts that since the victim was travelling in the offending vehicle as gratuitous passenger, the insurance company cannot be held liable to suffer the liability arising out of the accident on the strength of the

insurance policy. However, keeping in view the benevolent object of the act and other relevant factors arising in the case, the Court issued a direction against the insurance company to pay the awarded sum to the claimants and then recover the same from the insured in the same proceedings by applying the principle of pay and recover. In the said case, the Hon'ble Apex Court faced with the arguments that consideration of the issue with regard to pay and recover in a case of gratuitous passenger is pending before a Larger Bench, observed as under:-

"26. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in *Baljit Kaur*, (2004) 2 SCC 1 and *Challa Upendra Rao*, (2004) 8 SCC 517 should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, the claimant was 28 years old. He is now about 48 years. The claimant was a driver of heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to the stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 (*National Insurance Co. Ltd. vs. Saju P. Paul*, SLP No. 20127 of 2011) and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent 2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in *Challa Upendra Rao* (supra)."

11. In view of the discussion of the law on the subject as given herein before, it becomes clear that the Tribunal is well within its power to direct the insurance company to pay the awarded amount to the claimants with a right to recover the same from the insured even in a case where it has been established that the deceased/insured was travelling as a gratuitous passenger in a load carrier, if the Tribunal finds that the facts and circumstances of the case deserve the adoption of the aforesaid course.

11. In the instant case, the claimants happen to be the parents of the deceased, who was a young girl. They must have suffered psychologically on account of death of their daughter and if they are asked to chase the owner for the satisfaction of the awarded amount, it will amount to adding insult to their injury. Therefore, the Tribunal in this case was perfectly justified in passing the order of pay and recover against the appellant herein.

For the foregoing reasons, I do not find any ground to interfere with the impugned award passed by the Tribunal. There is no merit in this appeal. The same is, accordingly, dismissed. It is, however, made clear that for recovery of

the awarded amount from the owner of the offending vehicle, the appellant need not file a separate suit, but it may initiate execution proceedings before the Tribunal.