

(2020) 09 J&K CK 0021

In the Jammu And Kashmir High Court

Case No : Mac App No. 178 Of 2019, Criminal Obj No. 2 Of 2020

Oriental Insurance Company Limited

APPELLANT

Vs

Aijaz And Others

RESPONDENT

Date of Decision : 08-09-2020

Acts Referred:

Citation : (2020) 09 J&K CK 0021

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : R.K.Jain, Sunny Mahajan

Final Decision : Dismissed

Judgement

Sanjeev Kumar, J

1. The Oriental Insurance Company Limited ["the insurer"] is in appeal against the award dated 4th September, 2019 passed by the Motor Accident Claims Tribunal, Ramban ["the Tribunal"] in file No. 70/Claim entitled Mohd. Aijaz v. Oriental Insurance Company Limited and another, whereby an award of Rs. 3,93,020/- along with simple interest pendente lite and future @ 7.5% per annum has been passed in favour of respondent No.1 ["the claimant"] and against the insurer.

2. The respondent No.1 has also filed cross objections seeking enhancement of the compensation awarded by the Tribunal.

3. Briefly stated, the facts leading to the filing of the appeal by the insurer and cross objections by the claimant-respondent No.1 are that on 18 th February, 2014, a motor vehicle accident took place at Mehar within the jurisdiction of Police Station, Ramban due to rash and negligent driving of an Auto Rickshaw bearing Registration No.JK19/2203 ["the offending vehicle"] by respondent No.2. In the accident, respondent No.1, who was travelling in the offending vehicle, suffered serious injuries and permanent disablement to the extent of 42%. The

respondent No.1, at the time of accident, claimed to be 19 years old and working as mechanic. He preferred a claim petition before the Tribunal, which was contested by the insurer alone. Respondent No.2, who was driver-cum-owner of the offending vehicle, chose not to appear and was, thus, proceeded ex-parte. On the basis of the pleadings of the parties, the Tribunal framed following issues for adjudication:-

"(i). Whether petitioner Mohd Aijaz sustained injuries in road traffic accident on 18.02.2014 at Mehar within the jurisdiction of police station Ramban due to rash and negligent driving of the vehicle No.JK19/2203 by respondent no.2? OPP

ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP

(iii) Whether the offending vehicle was being driven in violation of insurance policy? OPR-I

(iv) Whether the vehicle was having no valid documents at the time of accident? OPR-I.

(v) Relief?

4. With a view to discharge the burden of proof of issue Nos. (i), (ii) and (v), the claimant besides entering the witness box himself, also examined Mohd. Ashraf, Mohd. Farid and Dr. Safi-ud-Din as his witnesses. The insurer, however, did not lead any evidence. The Tribunal, upon appreciation of evidence on record, held issue No.(i) proved in favour of respondent No.1-claimant. It was held that the claimant had received injuries in the motor vehicle accident involving the offending vehicle, which, at the relevant time, was being driven rashly and negligently by its driver-respondent No.2. Issues Nos. (iii) and (iv), onus whereof was placed on the insurer, were held not proved for want of evidence. The Tribunal proceeded to determine compensation payable to respondent No.1. The Tribunal took the monthly income of the claimant as Rs.7,000/- and applied deduction of 50%. Taking the loss of earning capacity at 42% and applying the multiplier of 18, the Tribunal awarded a total compensation of Rs.3,93,020/- along with interest in favour of the claimant.

5. The insurer is aggrieved and has challenged the impugned award primarily on the following grounds:-

i) The offending vehicle, at the time of accident, was being driven by respondent No.2 in violation of the terms of the Insurance Policy and was overloaded with passengers, as is evident from the police challan, relied upon and placed on record by the claimant himself.

ii) The driver of the offending vehicle did not possess a valid and effective driving license and the same was without any valid route permit, fitness certificate and registration certificate etc.

iii) Since the owner-cum-driver i.e. respondent No.2 has chosen not to contest

the claim petition, as such, issue Nos. (iii) and

(iv) should have been held proved in favour of the insurer and against respondent No.2.

6. Mr. R.K. Jain, learned counsel for the insurer, emphasizes on the point that the initial burden to prove that the offending vehicle was covered by a valid route permit, fitness certificate and registration certificate etc is on the owner and if the same is not discharged, the burden of proof cannot be shifted to the insurer. He further argues that it was the duty of respondent No.2, who was driver-cum-owner of the offending vehicle, to place on record his driving license to discharge the initial burden. Mr. Jain also relies upon the police challan placed on record by the claimant and urges that the Tribunal should have placed reliance upon the police challan and held that the offending vehicle, at the time of accident, was overloaded and, therefore, the appellant-insurer was absolved of its liability to indemnify respondent No.2 and pay compensation to the claimant-respondent No.1.

7. Per contra, Mr. Sunny Mahajan, learned counsel for the claimant, vehemently opposes the contention of Mr. Jain. He argues that the burden of proof of issue Nos. (iii) and (iv) was specifically placed on the insurer and it chose not to lead any evidence and, therefore, the Tribunal decided both the issues against the insurer. He further submits that it was well within the right of the insurer to lead adequate evidence to discharge the burden of proof of issue Nos. (iii) and (iv) and in doing so it could have even summoned respondent No.2 as its witness, but the insurer decided not to lead any evidence and, thus, left issue Nos. (iii) and (iv) unproven. The Tribunal, thus, committed no illegality in deciding the aforesaid issues against the insurer. He, however, assails the impugned award contending that 50% deduction applied by the Tribunal was under no provisions of law. Mr. Sunny Mahajan argues that reliance placed by the Tribunal on the judgment of *Sarla Verma and ors v. Delhi Transport Corporation* and another, (2009) 6 SCC 121 for applying standard deduction of 50% to the established income of the injured was totally misplaced and erroneous. The judgment in the case of *Sarla Verma* (supra) provides for deduction on account of personal living expenses in the death cases and not in injury cases. He further claims that the Tribunal without any justification omitted to make addition of 40% to the established income of the claimant on account of loss of future prospects and, thus, committed another error in computing compensation.

8. Having heard learned counsel for the parties and perused the record, I am of the view that the impugned award, in its present form, cannot stand and deserves to be suitably modified. I am, however, not in agreement with Mr. R.K.Jain that in view of the grounds of challenge urged in the memo of appeal filed by the insurer, the insurer deserves to be absolved of its liability to indemnify the insured and pay compensation to the claimant-respondent No.1.

9. As noted above, the onus of proof of issue Nos. (iii) and (iv) was clearly placed

upon the insurer and, therefore, the same was required to be discharged by the insurer alone. It is trite law that the insurer, which alleges violation of the terms and conditions of the insurance policy, is obliged to prove such breach by leading cogent and satisfactory evidence. The plea of the insurer that the initial burden is on the insured is not supported by legal position obtaining on the point. The object of framing issues and placing of burden of proof on the parties is to make the parties concerned aware of their obligation to lead evidence and discharge burden put on them. Once the burden of proof of issue Nos. 3 and 4 was put on the insurer, the respondents were not expected to lead evidence to disprove the aforesaid issues, more so, when the insurer on its part had failed to prove the same [See National Insurance Company Limited v. Swarn Singh, (2004) 3 SCC 297].

10. From a perusal of the objections filed by the insurer before the Tribunal, it clearly transpires that it had taken no objection with regard to overloading of the offending vehicle. The argument that the offending vehicle, at the time of accident, was overloaded with passengers is, thus, after thought and raised for the first time in this appeal. In the absence of pleadings, there was no occasion for the respondents to prove to the contrary. The only legal objection, which the insurer took before the Tribunal, was with regard to the driving license of the driver and permit of the offending vehicle. It was pleaded that the driver was without valid and effecting driving license and the offending vehicle without any route permit. Accordingly, the Tribunal framed issue Nos. 3 and 4 and put the onus on the insurer. The insurer, in its wisdom, chose not to lead any evidence and, thus, left the issues not proved.

11. I am not in agreement with the contention of Mr. Jain that it was for the insured to produce relevant documents and to show that the driving license possessed by the driver, at the time of accident, was valid and that the offending vehicle was covered by a valid permit.

12. So far as driving license of respondent No.2 is concerned, the same was placed on record by respondent No.1 along with the claim petition and there is no denial of the said document by the insurer in its objections.

13. Be that as it may, I am in agreement with the findings of fact returned by the Tribunal that the insurer failed to discharge the burden of proof of issue Nos. 3 and 4.

14. Having found no substance in the appeal preferred by the insurer, I have considered the submissions of Mr. Sunny Mahajan and am in agreement with him that the Tribunal has committed errors of fact and law in working out just and fair compensation payable to the claimant-respondent No.1. The deduction of 50% applied by the Tribunal on the basis of the judgment of Sarla Verma (supra) is totally erroneous and contrary to law. The Sarla Verma (supra) was a case arising out of death in a motor vehicle accident and it was held that for determining fair and just compensation, a portion of the income, depending upon

number of dependents left behind by the deceased, is required to be applied on account of personal living expenses of the deceased. This deduction obviously is not applicable in the cases of injuries caused to the claimants in motor vehicle accidents. This part of the award, therefore, has to go. The Tribunal has also omitted to make addition to the established income of the claimant by way of loss of future prospects. Going by the age of the claimant-injured, which was proved to be 19 years and that he was a self employed person, there ought to be an addition of 40% to the established income of the claimant for working out loss of future income on account of disablement. To this extent also, the award needs to be modified and corrected. The Tribunal has correctly applied the multiplier of 18 and that does not call for any interference. The amounts paid on account of medicines/hospital charges, transport/food/attendant charges and loss of income during treatment do not call for any variation or modification. However, the amount awarded under the head "pain and suffering" deserves to be enhanced suitably. Keeping in view the nature of injuries suffered and 42% disablement, it would be in the fitness of the things to award a sum of Rs.50,000/- on account of "pain and suffering".

15. For the foregoing reasons, the cross objections of the claimant-respondent No.1 succeed. The claimant-respondent No.1 is held entitled to following amount of compensation:-

Loss of future income = Rs.8,89,056.00 ($7000 + 40\% = 9800 \times 42\% \times 12 \times 18$)

Medical expenses etc = Rs.28,500.00

Transportation/food/attendant = Rs.15,000.00

Loss of income during treatment = Rs. 7,000.00

Pain and suffering = Rs. 50,000.00

Total = Rs. 9,89,556.00

Award of the Tribunal is modified, accordingly. However, the interest awarded and other terms and conditions imposed by the Tribunal shall remain unchanged.

16. As a result, the appeal of the insurer is dismissed and cross objections of the claimant-respondent No.1 are allowed to the extent aforesaid. The appellant to deposit the balance amount in terms of the modified award before the Registry within four weeks. On deposit, the Registry shall release the same in favour of the claimant.