(2019) 07 J&K CK 0031

In the Jammu And Kashmir High Court

Case No : MA No. 25, 26 Of 2015, CM 28 Of 2015, 01 Of 2017, 4302 Of 2019

Oriental Insurance Company Limited APPELLANT

Vs

Neeraj Chandan And Anr RESPONDENT

Date of Decision : 23-07-2019

Acts Referred:
Motor Vehicles Act, 1988 — Section 149

Citation : (2019) 07 J&K CK 0031

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Raghu Mehta, D S Chouhan

Final Decision : Disposed Off

Judgement

Sanjeev Kumar, J

MA No.25/2015:

1. This appeal by Oriental Insurance Co. Ltd (hereinafter referred to as the Insurer) is directed against the award dated 20.09.2014 passed by the

Motor Accidents Claims Tribunal, Rajouri (hereinafter â??the Tribunalâ?? for short) in Claim No.128/C titled Neeraj Chandan v. Ram Murti and

anr., whereby the respondent No.1 (hereinafter referred to as the claimant) has been held entitled to a sum of ☐ 7,57,200/- along with interest @ 6 per

cent from the date of filing of the petition till realisation except on future loss of income.

2. Briefly stated, the facts leading to the filing of this appeal, as are gatherable from the pleadings of the parties and the award, are that on 19.08.2008,

a Maruti Van bearing Registration No.4720/JK02G driven by its driver Sanjeev Kumar in rash and negligent manner hit a stationary truck bearing

Registration No.9810/JK02R near hotel of one Pritam Singh at Chingus and as a result of this accident, the driver Sanjeev Kumar died on spot and the

claimant was travelling in the offending vehicle suffered critical injuries. He filed claim petition before the Tribunal which was contested by the owner

as well as the insurer, the appellant herein. On the basis of the pleadings of parties, the Tribunal framed the following issues:

1. Whether, on 19.8.2008 the driver of vehicle No.JK02G/4720 while driving the said vehicle rashly and negligently caused an accident at Chingus

National Highway near hotel of Pritam Singh within the jurisdiction of Police Station Rajouri as a result of which the petitioner sustained injuries

resulting into permanent disablement? OPP

2. In case issue No.1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? OPP

3. Whether the driver of offending vehicle was not holding a valid Driving licence at the time of accident, if so, to what effect? OPR-3

4. Whether any terms and conditions of insurance policy have been violated? If so, to what effect? OPR-3.

3. With a view to discharge its onus, the claimant besides appearing himself as witness also examined PW-Santosh Kumari, PW- Ragubhir Pal and

PW- Dr. Shalinder Sharma as his witnesses. The Insurer, however, examined one witness i.e. PW Madan Lal, a clerk in the office of Insurer. On the

basis of the material and evidence on record, the issue No. 1 was held proved in favour of the claimant. The Tribunal held that the accident had been

caused by the driver of the offending vehicle by act of his rash and negligent driving in which the claimant sustained injuries resulting into his

permanent disability. Issue No.2 was also decided in favour of the claimant and he was held entitled to a compensation of ☐ 7,57,200/- along with

interest as noted above. On the Issue Nos. 3 and 4, the Tribunal after considering the statement of RW-Madan Lal, a clerk in the office of Insurer,

came to the conclusion that the claimant who was travelling in the offending vehicle was a third party and, therefore, insured with the insurer.

Accordingly, the aforesaid issues were also decided in favour of the claimant and against the insurer and consequently impugned award was passed.

4. The appellant is aggrieved of the impugned award and assails the same, primarily, on the ground that the policy of insurance issued by the insurer in

favour of the insured qua the offending vehicle was â??Act Policyâ?? and, therefore, did not cover the liability to indemnify the insured in respect of

injury or death to the occupant in the offending vehicle. The amount awarded has also been assailed by the insurer on the ground that the Tribunal was

not justified in calculating the compensation payable to the claimant while taking loss of earning capacity as 40 per cent. With a view to substantiate

the grounds of challenge taken in the appeal, reliance has been placed on the copy of the insurance policy to contend that it was an Act Policy which

only covered third party risk and was not intended to cover the risk of occupant in the insured vehicle other than the owner and the driver. Reference

was also invited to the schedule of premium to indicate that the insurer had charged the premium only on account of personal accident for the owner

and driver, and the passengers other than owner and driver were not covered by the policy of insurance nor any premium had been charged. With a

view to buttress his submissions, Mr. D S Chouhan, learned counsel for the claimant has relied upon the following judgments: Branch Manager, United

India Insurance Co. Ltd. V. Kondakotla Saroja and others, 2009 ACJ 1127; Divisional Manager, Oriental Insurance Co. Ltd. V. Arati Mishra and

another, 2011 ACJ 196; Oriental Insurance Co. Ltd. V. Bhoomi Reddy Peddi Reddy Lakshmi Devi and others, 2012 ACJ 211; National Insurance Co.

Ltd. V. Balakrishan and another, 2013 ACJ 199; Oriental Insurance Co. Ltd. V. Surendra Nath Loomba and ors, 2013 ACJ 321; Siyaram v.

Devkuwar and others, 2014 ACJ 2473 and Shrishail v. Keerthi and others, 2018 ACJ 241.

5. Per contra, the learned counsel for the petitioner has contended that the injured claimant who was travelling in the offending vehicle was a third

party and, therefore, the Company cannot be absolved its liability to pay compensation to the injured by way of indemnification of the insured. He

relies on the provisions of Section 149 of the Motor Vehicles Act, 1988 and also seeks to drive support from a three judge bench judgment of the

Supreme Court rendered in the case of National Insurance Co. Ltd. V. Swaran Singh and ors, (2004) 3 SCC 297 to buttress his submissions.

6. Heard learned counsel for the parties and perused the record.

7. The only question that begs determination in this appeal is whether the appellant insurer after satisfying the award and paying the compensation to

the claimant is entitled to an order to recover the said amount from the insured, i.e. owner of the offending vehicle. The aforesaid question, in view of

several judgments on the point rendered by the Apex Court is no longer Res Integra. In the case of Manager, National Insurance Co. Ltd. V. Saju P.

Paul, (2013) 2 SCC 41, the Supreme Court considered this question and after surveying the entire case law on the subject held on facts that since the

victim was travelling in the offending vehicle as gratuitous passenger and hence, the insurance company cannot be held liable to suffer the liability

arising out of the question on the strength of the insurance policy. However, the Supreme Court keeping in view the benevolent object of the Act and

taking into consideration other relevant factors arising in the case issued directions against the insurance company to pay the awarded sum to the

claimant and then to recover the said sum from the insured in the same proceedings by applying the principle of â??pay and recoverâ??. Relying

upon the aforesaid judgment, the Supreme Court again in the case of Manuara Khatun and others v. Rajesh Kumar Singh and others, (2017) 4 SCC

796 also applied the principle of â??pay and recoverâ?? in the case where the deceased was found travelling as gratuitous passenger in the offending

vehicle. Somewhat similar issue fell for consideration of the Supreme Court in the case of Shivaraj v. Rajendra and anr, (2018) 10 SCC 432. The

observations of the Honâ??ble Supreme Court as contained in paragraphs (9) and (10) are relevant and, therefore, both the paras are reproduced

hereunder:

â??9. The High Court, however, found in favour of respondent No.2 (insurer) that the appellant travelled in the tractor as a passenger which was in

breach of the policy condition, for the tractor was insured for agriculture purposes and not for carrying goods. The evidence on record unambiguously

pointed out that neither was any trailer insured nor was any trailer attached to the tractor. Thus, it would follow that the appellant travelled in the

tractor as a passenger, even though the tractor could accommodate only one person namely the driver. As a result, the Insurance Company

(respondent No.2) was not liable for the loss or injuries suffered by the appellant or to indemnify the owner of the tractor. That conclusion reached by

the High Court, in our opinion, is unexceptionable in the fact situation of the present case.

10. At the same time, however, in the facts of the present case the High Court ought to have directed the Insurance Company to pay the

compensation amount to the claimant (appellant) with liberty to recover the same from the tractor owner, in view of the consistent view taken in that

regard by this Court in National Insurance Co. Ltd. Vs. Swarna Singh & Ors.1, Mangla Ram Vs. Oriental Insurance Co. Ltd.2, Rani & Ors. Vs.

National Insurance Co. Ltd. & Ors.3 and including Manuara Khatun and Others Vs. Rajesh Kumar Singh And Others.4 In other words, the High

Court should have partly allowed the appeal preferred by the respondent No.2. The appellant may, therefore, succeed in getting relief of direction to

respondent No.2 Insurance Company to pay the compensation amount to the appellant with liberty to recover the same from the tractor owner

(respondent No.1).â??

8. There is another judgment of the Supreme Court in the case of Shamanna and Another vs. Divisional Manager, Oriental Insurance Company

Limited, (2018) 9 SCC 650. In the aforesaid case, the Honâ??ble Supreme Court relying heavily on its decision in the case of Swaran Singh and

others (supra), which was later followed in National Insurance Co. Ltd. V. Laxmi Narain Dhut, (2007) 3 SCC 70 0held that with the disposal of

reference by the larger Bench in National Insurance Co. Ltd. V. Parvathneni and another, (2009) 8 SCC 785 by keeping the question of law to be

decided in an appropriate case, the law enunciated in the case of Swaran Singh (supra) and followed in Laxmi Narain Dhut (supra) holds the field and,

therefore, in the case of gratuitous passenger, the insurer is liable to be directed to pay the amount to the claimant and then recover the same from the

insured. The insurer shall not be required to file a suit but may initiate proceedings before the concerned executing court as if the dispute between the

insurer and the insured was subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer.

The discussion made by the Supreme Court in the judgment from paras 6 to 13 clears the mist on the question raised in this appeal with regard to the

liability of the insurer to pay the compensation to the claimant who is found travelling in the offending vehicle as gratuitous passenger and its right to

recover the awarded amount from the insured.

9. The plea of the appellant that the amount of compensation awarded by the

Tribunal is exorbitant and the Tribunal has not correctly taken the loss of earning capacity having regard to the permanent disability suffered by the claimant. I have gone through the award and the findings returned by the Tribunal on Issue No.2 and am satisfied that the Tribunal has correctly taken the loss of future income at 40 per cent having due regard to the nature of injuries suffered by the claimant.

10. I do not find any merit in the plea of the petitioner that the appellant is absolved of its liability to pay the compensation to the claimant and hold that principle of â??pay and recoverâ?? would apply and the appellant after satisfying the award and paying the compensation to the claimant shall be entitled to recover the same from the insured in the manner provided in Oriental Insurance Co. Ltd. V. Nanjappan and ors., (2004) 13 SCC 224. The amount awarded by the Tribunal as also the interest is, however, upheld.

11. MA No.25/2015 is accordingly disposed of.

MA No.26/2015:

1. This appeal arises out of the same accident involving vehicle No.JK02G/4720, in which the claimant Neeraj Chandan and the claimant herein, namely, Santosh Kumari, the respondent No.1 suffered serious injuries and were permanently disabled and the driver of the offending vehicle, namely, Sanjeev Kumar died. The manner in which the accident happened and deceased Sanjeev Kumar died and Neeraj Chandan and Santosh Kumari claimants got serious injuries has already been detailed in MA No.25/2015 and, therefore, is not reiterated here. The only issue that has been raised by the appellant is that the insurance policy issued by the insurer in favour of the insured qua the offending vehicle was an â??Act policyâ?? and, therefore, did not cover the liability to indemnify the insured in respect of injury or death of the occupant in the offending vehicle.

2. The issue raised in this appeal has been elaborately discussed hereinabove and what is held in MA No.25/2015 would apply on all fours to the instant case. This appeal is, accordingly, disposed of, on the analogy of judgment passed in MA No.25/2015. The plea of the appellant that it is absolved of its liability to pay the compensation to the claimant (respondent No.1), a gratuitous passenger in the offending vehicle, is found to be without any merit and, therefore, rejected. The principle of â??pay and recoverâ?? shall apply to the case and the appellant is directed to satisfy the

award and pay the compensation to the claimant, respondent No.1 along with interest as awarded by the Tribunal and then recover the same from the

insured, i.e. the respondent No.2 in the manner provided in MA No.25/2015. The amount awarded by the Tribunal along with interest is, however,

upheld.

3. MA No.26/2015 is disposed of, as above along with connected CMs.

