

(2011) 01 PAT CK 0037

In the Patna High Court

Case No : M.A. Nos. 295 and 272 of 2002

The National Insurance Company Ltd.

APPELLANT

Vs

Meena Devi and Others

RESPONDENT

Date of Decision : 27-01-2011

Acts Referred:

Citation : (2011) 01 PAT CK 0037

Final Decision : Dismissed

Judgement

Gopal Prasad, J.—Heard learned Counsel for the parties. The two Miscellaneous Appeals are heard together and being disposed off by the common order as both arises out of the same order dated 8.4.2002, passed by Sri Amresh Kumar Lal, 6th Additional District Judge-cum-Motor Accident Claims Tribunal, Chapra, in M.A.C.T. Case No. 14 of 2001, by which he has granted compensation to the claimant to the tune of Rs. 6,60,000/- (six lakh sixty thousand) with an interest of 9% per annum on amount after deducting Rs. 50,000/-, which has already been paid as interim compensation. Both the learned Counsel, for the claimant and the insurer Insurance Company, has preferred separate appeal against the impugned order dated 8.4.2002.

2. The Insurance Company has filed the Miscellaneous Appeal No. 295 of 2002 asserting that the deceased was a pillion rider and hence not covered under the insurance policy and further challenged that the quantum of compensation granted by the Tribunal is excessive.

3. The claimant has, however, filed appeal bearing Miscellaneous Appeal No. 272/2002 challenging the impugned order on the ground that quantum fixed by Tribunal is excessive low and unjust particularly the multiple in fixing the quantum was excessive low.

4. On perusal of record it appears, while deceased Dharmendra Kumar Singh was coming to Chapra from Patna by Suzuki Motorcycle, bearing registration No. BR 04 A 6345, being driven by the owner of the said motorcycle, Mr. Manoranjan

Prasad Gupta, and Dharmendra Kumar Singh was pillion rider, when the motorcycle met with an accident due to rash and negligent driving. As a result of which, Dharmendra Kumar Singh died at the spot, leaving behind his widow and a minor son and a daughter as well as his mother and father. Dharmendra Kumar Singh had got a shop "electronic centre" by which, he was earning of Rs. 6,000/- per month and asserted that by the death of Dharmendara Kumar Gupta (sic-Singh ?) dependents lost the bread earner.

5. However, the claim was resisted by the Insurance Company and it has been asserted that deceased was coming from Patna and a part of road bridge was being constructed, and half part was left for travelling and the driver of the motorcycle, without observing the construction of bridge drove straightway in open portion meant for construction of the bridge and the vehicle fell in the river and the deceased owner-cum-driver died by drowning and the entire occurrence took place due to rash and negligent act of the driver of the vehicle as the driver did not take care and caution to avert occurrence. It has further been asserted in para 7 of the written statement that this petition is hit by Section 2 of the Motorcycle/Scooter Insurance "B" Policy Clause 2 which reads "death or bodily injury to any person conveyed in or on the motorcycle provided such person is not carried for hire or reward" and further it has been asserted in the written statement all the documents have not been filed like the insurance policy and driving licence and the opposite party denies that the driver of the vehicle had valid licence and the owner be directed to file driving licence. The Insurance Company and other party prayed for seeking protection, u/s 147 of the Motor Vehicle Act, 1988, and crave leave to refer any relevant policy of insurance.

6. At the time of hearing before the Tribunal, on pleading of the parties four issues were framed, (i) Whether the claim petition as framed is maintainable, (ii) Whether the death of Dharmendra Kumar Singh was caused due to rash and negligent driving of the vehicle, (iii) Whether the vehicle was insured by Opposite Party No. 1 the National Insurance Company and (iv) Whether the applicant are entitled to receive compensation.

7. The claimant adduced, both oral and documentary evidences, the oral evidence adduced on behalf of the claimant is AW-1, Arvind Kumar, AW-2, Amar Kumar Gupta, AW-3, Vijendra Kumar Singh, AW-4, Prem Kumar and AW-5 Meena Devi, the documentary evidence, Exhibit-1 is the Post Mortem Report, Exhibit-2, is the copy of the recurring deposit in the Bank of India, Exhibit-3 is the copy of the Jan Dristi, Exhibit-4 (c) is the receipt of the rent, Exhibit 5 to 5 (g) is the receipt of Electricity Board, Exhibit-6, is the Registration Certificate, Exhibit-7, is the Mark-Sheet, Exhibit-8 is the certificate of Electronic Services Industries College, Exhibit-9, is the photocopy of the School Leaving Certificate, Exhibit-10, is the formal F.I.R., Exhibit 11, is the true copy of the Fardbayan, Exhibit-12, is the Pass Book and Exhibit-13 is the policy.

8. However, neither any documentary nor oral evidence has been adduced on behalf of the Insurance Company.

9. On considering the oral and documentary evidence, the Tribunal while considering issue No. (i) and (ii), together held that the accident took place due to rash and negligent driving of the vehicle in question and there is no infirmity regarding the maintainability of the appeal.

10. While deciding Issues No. (iii) and (iv), the Tribunal held that opposite party No. 1 the insurer, is liable to pay compensation to the Appellant and the Appellants are entitled to get Rs. 6,60,000/- out of which Rs. 50,000/- has already, been paid by the insurer on 22.12.2001 as interim compensation and hence the insurer is directed to pay 6,10,000/- with interest at the rate of 9% per annum from the date of the institution of the claim petition and hence allowed the claim petition to the extent mentioned above.

11. Learned Counsel for the Insurance Company, however, contended that the policy of insurance was Act policy and the deceased was a pillion rider and a gratuitous passenger so was not a third party and since the pillion rider are not covered under the policy he cannot claim from the insurer and has placed reliance on decision reported in United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, and further relied upon decision reported in The General Manager, United Insurance Co. Ltd. Vs. M. Laxmi and Others, The learned Counsel for the Insurance Company further challenge the quantum of compensation granted by Tribunal, u/s 170 of the Motor Vehicles Act.

12. The learned Counsel for the claimant, however, contended that the said vehicle was insured and the policy was not an Act policy but was a comprehensive policy and even circular of Traffic Advisory Committee, issued covering the risk of person carried on motorcycle including the pillion rider in case of comprehensive policy. The cover note of the policy has been filed which has been marked as Exhibit-13 apparently mentions that policy is comprehensive but the term of the policy has neither been filed by the insured nor by insurer. It has further been contended that a petition under Order XLI Rule 27 of the CPC Code, has been filed for marking the term of policy as exhibit which is part and parcel of policy as the claimant has obtained the complete insurance policy with terms of policy condition which covers the risk of a pillion rider and hence required to be marked in the interest of justice to do complete justice. It has further been contended that in para 7 of the written statement of the insurer has been admitted that the policy condition mentions "B" policy. Clause 2 of Insurance "B" (policy condition Clause 2), mentions "death or bodily injury to any person conveyed in or on the motorcycle provided that such person not carried for hire and reward" hence covers the risk of person carried on motorcycle including pillion rider. It has further been contended that circular of Tariff Advisory Committee has contained in the India Motor Tariff (I.M.T.) are binding on all concerned and any breach thereof, would amount to breach of the provision and it has prescribed the general regulation, that there were two types of policy, one statutory policy and second is package policy, which covers the loss or damage to the vehicle insured in addition to the liability covered in the earlier

clause direction of the Tariff Advisory Committee to incorporate the risk including occupants carried in the motor car provided that such occupant are not carried for hire or reward and hence since the cover notes or the policy mentions a comprehensive policy and para 7 of the written statement also mentions that it covers the risk of person carrying on the motorcycle i.e. a pillion rider and further the Tariff Advisory Committee has also issued a direction to cover the pillion rider in comprehensive policy which is binding on all concern under the Motor Vehicles Act, 1988 and further the claimant has brought the policy condition on record which can be marked as exhibit and considered to take note of the fact that the policy was comprehensive policy and terms and condition covers the risk of pillion rider and hence the claimant is entitled to compensation and also taken the plea of enhancement as the age of the deceased and the wife is less than 30 years and hence the multiple fixed for computing the compensation is low.

13. Hence, on respective submissions of the parties, the question for consideration (i) Whether, the claimant is entitled for the claim from the Insurance Company?, when deceased was pillion rider at the time of accident (ii) Whether the quantum of compensation is liable to be enhanced in view of the fact?, (iii) Whether the multiplier is properly assessed by the Tribunal? and (iv) Whether the Insurance Company can challenge the quantum without permission of Tribunal u/s 170 of the Motor Vehicles Act, to contest on issues other than the policy condition.

14. However, the facts are admitted that accident took place by motorcycle being driven by owner that the deceased was a pillion rider and while going on the motorcycle of the owner met with an accident by which he succumbed to injury. The vehicle was insured and the policy was comprehensive policy and quantum for consideration whether the risk of pillion rider was covered in the policy, question for consideration, whether the pillion rider is entitled for compensation?

15. The learned counsel for the Appellants have relied upon the decision reported in AIR 2006 S.C. 1577, (United India Insurance Co. Ltd. v. Tilak Singh and Ors.) where the deceased was a pillion rider and there under the facts and circumstances of the case since the policy was the statutory Act policy covering the risk of third party only and hence it was held that since the policy was the statutory policy covering the risk of only third party and it did not cover the risk of the death or bodily injury to gratuitous passenger and hence it was held that the Appellants were not liable for compensation.

16. The learned Counsel for the Appellant has further relied upon the decision reported in 2009 A.C.J. (1) 104 (supra) . In the said decision, the pillion rider claimed compensation on the basis of circular of Tariff Advisory Committee. Though it was held that comprehensive policy cover the risk of pillion rider but rejected the claim on ground that policy in that case was only Act policy and not comprehensive policy,

17. However, the learned Counsel for the claimants have relied upon the decision reported in *New India Assurance Co. Ltd. Vs. Bhupen Saikia and Another*, where it has been held that in an Act policy pillion rider or gratuitous passengers are not covered. However, held that for covering the risk of pillion rider or gratuitous passenger there should be specific coverage, further held in certain comprehensive policy apart from statutory liability only own damages are covered. In such circumstances gratuitous passengers are not covered. Hence the coverage of the risk of pillion rider and gratuitous passenger depends upon the term of the policy like any other commercial contract and it is the term of the policy that has to be considered and if the policy condition covers the risk of gratuitous occupant of the vehicle and specific coverage is provided as, then Insurance Company is liable to pay compensation. Under the facts and circumstances, it take into consideration the policy as "B" policy and Section II (1) (1) of condition attached to the policy issued in the case showed that as per the term of condition of policy, gratuitous occupants are covered and Insurance Company is liable to pay.

18. In decision reported in 2009 (4) A.C.J. 2218 (*Royal, Sundaram Alliance Insurance Company Ltd. A. Meenakshi and Ors.*), the Bench of Madras High Court has taken notice of the circular dated 17.3.1978 issued by the Tariff Advisory Committee directing the insurance Company to incorporate the words "including occupants carried in the motor car provided that such occupants are not carried for hire and reward". Considering circular dated 2.6.1986 refers to comprehensive policy and the circular of Tariff Advisory Committee being incorporated in contract in package policy held comprehensive policy gratuitous occupant's risk is covered and considering the decisions reported in 2006 A.C.J. 1441 (*supra*) : 2000 (1) A.C.J. (*Oriental Insurance Co. Ltd. v. Dhapubai and Ors.*) 2003 A.C.J. (1) (*supra*), S.C. 2009 (1) A.C.J. 104 (*supra*) .

19. In *Ashok Vs. Narmada Bai and Another*, it has been held that the pillion rider sustain factual injury while two wheeler slipped due to rash and negligent driving by its owner, the motorcycle was comprehensively insured including the liability to the public risk and pillion rider and hence the pillion rider was covered.

20. In decision reported in *ICICI Lombard General Insurance Co. Ltd. Vs. Ashaben Gautambhai Vala and Others*, , where again the question was raised by the insurer that the victim of accident was pillion rider and the insurer was not liable to indemnify where the incident was occurred in 2006-07 and the New India Motor Tariff, which superseded the Indian Motor Tariff on 30.6.2002 was applicable. However, under the facts and circumstances, it was found that the motorcycle in accident was insured under a two wheeler package policy and the policy had to be issued only in forms prescribed in the Indian Motor Tariff by the Tariff Advisory Committee were binding on all concerned and the issue was whether two wheeler package policy prescribed under I.M.T. would cover the risk of pillion rider and it was held that the Appellant insurer liable to indemnify the insured in respect of the claim of the compensation arising out of the death or

bodily Injury to the occupants carried in the vehicle including the pillion rider and hence from the above discussions and decisions of the Apex Court and High Court, it is apparent that if the policy is comprehensive and covers the risk of the pillion rider, then Insurance Company is liable to pay the compensation for the death and bodily injury to the pillion rider but if the policy is only Act policy the risk of pillion rider is not covered.

21. However, now coming to the facts and circumstances of the case, admitted factual position is that the deceased was a pillion rider, however the policy has been marked as Exhibit-13 and the policy mentions as a comprehensive policy and shows a payment of comprehensive premium, and also mentions scooter insurance "B" policy. However, the term of contracts of the policy has neither been filed by the insurer nor by the owner. However, the policy of the insurance filed by the claimant Ext.-13, it has been contained in one page, which is the policy but not contains the terms of the contract in the comprehensive policy as the amount shows that the comprehensive premium paid to the tune of Rs. 488/- and the policy has done to be a scooter insurance "B" policy and hence Ext-13 the insurance policy shows that the policy was not only the Act policy but a comprehensive policy. However, a petition under Order XLI Rule 27 of the CPC has been filed by the claimant introducing the terms and conditions of the scooter insurance "B" policy. However, Interlocutory Application No. 8255/2010 was filed and even copy of the same served on the other side but no counter affidavit has been filed and the said document specifically contain. However, it was contended, at the time of the argument that the case may not be marked under Order XLI-Rule 27 of the CPC Code, as it does not satisfy the condition under Order XLI Rule 27 (1) a and 1 (a) as it has not been stated that the claimant was not aware with this term and condition and has neither filed it in the lower Court nor has shown that he was not aware with the fact and with due diligence cannot be brought into the evidence.

22. Learned Counsel for the claimant, however, contended that the matter concerned with the Claim Tribunal and before the Claim Tribunal the CPC and Evidence Act are not required to strict compliance and the material evidence sought to be adduced in evidence is germane to the issue is to do substantive justice. The policy was filed in one page. The Insurance Company is not denying that the vehicle was not insured and the insurance policy on record is marked as exhibit-13, mentions it a comprehensive policy apparently on face of it with premium. However, it was incumbent on the claimant and the insurer to produce policy when they have knowledge about the insurance policy number and insurance but, neither insured nor insurer produced the contract/condition of policy nor any objection was taken that the policy does not cover the risk of the pillion rider. However, the only objection taken in the written statement that the vehicle was not being driven by a driver having a valid licence, and hence taking into consideration, the policy which shows that the policy is comprehensive, but, the condition of the policy has neither been brought on record either by the Insurance Company or by the owner. But para 7" the written statement of the

Insurance Company, admitted the policy condition and term of contract about Section II of the Act, motorcycle/scooter insurance "B" policy Clause 2 admitted which reads "death or bodily injury to any person conveyed in or on the motorcycle provided such person is not carried for hire or reward". Hence it is apparent that the Insurance Company has admitted the condition of the policy that person being carried on the scooter are covered and hence the person being carried on the scooter is covered under policy and hence having the admitted position that policy covered the risk of person carried on scooter i.e. the gratuitous passenger, no proof is required. However the only exceptions mentioned that such person be not carried for hire or reward. However, if the Insurance Company has not taken any objection as such that pillion rider was being carried for reward or hire nor has adduced any evidence to establish as such, this objection then it was on insurer to prove that the deceased Dharmendra Kumar Singh was being carried for hire or reward, but, the Insurance Company has neither pleaded nor laid any evidence to prove that Dharmendra Kumar Singh was being carried for hire or reward. Moreover, the objection has been raised that claimant does not satisfy the condition to admit the policy condition which has been brought on record to prove as additional evidence. However, the Evidence Act and the provisions of the CPC are not applicable to the proceeding of the Motor Vehicles Act, 1988 and the contract of policy are Condition (ii) 1 (i) are same term as specified in document.

23. However having regard to the fact being established that the policy was comprehensive policy covering the risk of the gratuitous passenger and the claim proposition of law having been established that the I.M.T. had incorporated the risk of gratuitous passenger and further being established the clear proposition of law if the policy is comprehensive policy covering the risk of the gratuitous passenger then the claimant will be entitled to compensation.

24. However, having regard to the facts and circumstances of the issue, where the policy condition covers the risk of the policy and hence in such circumstance the policy condition mentions may be taken in evidence in the interest of justice and there is no reason to reject the petition under Order XLI Rule 27 of the CPC at all. However taking into consideration the fact that the policy is annexure 13 in one page on record shows that policy is comprehensive, however, the policy conditions are not there, but in para 7 of the written statement, there is admission that the policy condition covered the risk of the person being carried on the motorcycle and factually that the policy was comprehensive which is apparent from Exhibit-13 itself which mentions the comprehensive premium paid and the policy is insurance "B" policy as per admission of Railways in para 7 of the written statement itself shows that the policy covers the risk of the person carried on the motorcycle and once these conditions are satisfied the Insurance Company are liable under the term of the policy to pay compensation even and these can be held on the contract of the policy filed by the Appellant along with the petition under Order XLI Rule 27 of the CPC Code. However, further the Tariff Leave Condition (TLC) has issued direction that in case of a comprehensive policy

the risk of the pillion rider is covered and hence in that view of the matter taking into consideration the format and fact and circumstance I find and hold that the deceased was covered under the policy.

25. However, the next question for consideration is that the Insurance Company has challenged the quantum. Admittedly no permission has been taken u/s 170 of the Motor Vehicles Act, 1988, for contest and hence in view of decision reported in 2007 (7) S.C.C. 456 (National Insurance Company Ltd., Chandigarh v. Nicolletta Rohtagi and Ors.), it has been settled that if permission u/s 170 of the Motor Vehicle Act, 1988 has not been taken, then the Insurance Company cannot be allowed to challenge the quantum of compensation or the finding regarding the negligence.

26. However, the claimant has in her appeal challenged the quantum excessive low and challenged the multiple fixed by Tribunal while computing the compensation. Hence covering to the factual matrix, the fact that the victim was 30 years and the claimants are the wife and the children of the deceased who are within 30 years and hence both the claimants are less than 30 years but the multiplier has been assessed as 15. However the multiplier mentions in Schedule 2 of Motor Vehicles Act is of universal application and hence for the age group of 25 to 30 years, multiplier 18 is required to be assessed and hence computation of the compensation on the basis of 15 are not sustainable, and hence the quantum of compensation requires to be recalculated, taking the multiplier of 27 (sic-18?) . However, the dependency has been assessed as 3,500/- per month, i.e. Rs. 42,000/- per annum and taking the multiplier as 18 the dependency comes to Rs. 7,56,000/- and hence the impugned order to that extent is set aside and it is hereby directed that the claimant is entitled to receive compensation to the tune of Rs. 7,56,000/-. However Rs. 50,000/- has already been paid and hence claimant is entitled to receive Rs. 7,06,000/- with an interest as given by the Tribunal.

27. Hence the Miscellaneous Appeal No. 295 of 2002 is hereby dismissed and the Miscellaneous Appeal No. 272 of 2002 is allowed to the extent mentioned above.