(2019) 07 GUJ CK 0066

In the Gujarat High Court

Case No : R/First Appeal No. 562, 571, 572, 574, 575, 576, 577 Of 2019 With Civil Application (For Stay) No. 1 Of 2019

United India Insurance Co. Ltd — APPELLANT

Vs

Baldevbhai Shivrambhai Prajapati — RESPONDENT

Date of Decision : 04-07-2019

Acts Referred:
Motor Vehicles Act, 1988 — Section 173, 173

Citation : (2019) 07 GUJ CK 0066

Hon'ble Judges : Bhargav D. Karia, J

Bench : Single Bench

Advocate : Gc Mazmudar, Hg Mazmudar, Nishit A Bhalodi

Final Decision : Disposed Of

Judgement

1. Admit. Learned advocate Nr. Nishit Bhalodi waives service of notice of admission in respective First Appeals on behalf of the respondentsÂ?

claimants.

2. Having regard to the controversy involved in the present cases which lies in a very narrow compass, with the consent of the learned advocates for

the respective parties, the matter is taken up for final hearing.

3. Being aggrieved by common judgment and order dated 20th September, 2018 passed by the Motor Accident Claims Tribunal (Auxi), Mehsana in

MACP Nos. 876/2011, 877/2011, 878/2011, 879/2011, 881/2011, 884/2011 and 901/2011, the appellantÂinsurance company has preferred captioned

First Appeals under section 173 of the Motor Vehicles Act, 1988 (â??the Actâ?? for short).

4. Since the Tribunal has passed the common judgment and order, all these First Appeals are heard together and would be disposed of by this common

judgment.

5. Short question which arises for consideration is whether the appellantÂinsurance company can be made liable to pay compensation to the claimants

when the deceased and the insured persons were travelling by payment of fare in a jeep which is insured as a private car ?

6. Brief facts of the case are that on 29th October, 2011 deceased and injured persons were travelling in a jeep bearing registration no.G.J.17.C.2027

and were going from Detrajpur to Mahudi. At that time, around 10:30 in the morning near Chadasna village Patiya, near the turning of Radhaswami

Ashram road, the driver of the jeep had driven the jeep in a rash and negligent manner endangering human life and the jeep turned turtle, as a result of

which, some of the passengers of the jeep received serious injuries while others succumbed to injuries. A complaint was registered against the driver

of the jeep being CR No.IÂ176/2011 before the Vijapur police station. The legal heirs of deceased as well as the injured persons therefore, filed claim

petitions claiming compensation.

7. On service of summons, owner of the jeep filed written statement at Exh.17 in MACP Nos. 877/2011, 876/2011 and 878/2011, at Exh.59 in MACP

No.879/2011, at Exh.18 in MACP Nos.880/2011 and 881/2011 and at Exh.15 in MACP No.901/2011 and the insurance company of the jeep filed its

written statement at Exh.12 in MACP Nos. 876/2011, 877/2011, 878/2011, 879/2011, 881/2011 and 884/2011 and at Exh.9 in MACP No.880/2011 and

at Exh.8 in MACP No.901/2011 denying the claim putforth by the claimants.

8. The Tribunal after considering the RC book of jeep at Exh.67 held that the capacity to carry passengers in jeep was 1 plus 9 i.e. driver plus nine

other passengers can sit in jeep whereas the deceased and the injured persons involved in the accident were eight only and therefore, it cannot be

believed that in jeep more persons were travelling than the capacity of the jeep as per the RC book. The Tribunal thereafter, on the basis of insurance

policy produced on record at Exh.68 found that the insurance premium was paid for the occupants in the jeep along with driver and therefore, held that

occupants in the jeep were the third parties and they were not travelling by payment of fare. The Tribunal thereafter, made the insurance company

liable jointly and severally with the owner of the jeep to pay the compensation as determined by it as under :

MACP No. 876/2011

MACP No. 877/2011

MACP No. 878/2011

Rs.75,600/Â?

Rs.75,400/Â?

Rs.4,00,480/Â?

MACP No. 879/2011

MACP No. 881/2011

MACP No.884/2011

MACP No.901/2011

Rs.10,60,660/Â?

Rs.4,77,000/Â?

Rs.2,61,000/Â?

Rs.1,75,100/Â?

9. Heard the learned advocate Mr. H.G. Mazmudar for learned advocate Mr. G.C. Mazmudar for the appellant and learned advocate Mr. Nishit A.

Bhalodi for the respondentsÂ? claimants in the respective First Appeals. Though served no one appears on behalf of the owner of the jeep.

10. Learned advocate for the appellantÂinsurance company submitted that the deceased/injured persons Âoccupier of the jeep were unauthorised

passengers and, therefore, they cannot be considered as third party qua the insured vehicle as their risk was not covered and, therefore, the

appellantÂinsurance company cannot be held liable to pay/reimburse the compensation. It was submitted that the insured vehicle was registered and

insured as a private vehicle and at the time of the accident, said vehicle was used for hire and reward and the driver had allowed eight to nine

passengers to travel in a vehicle which was against the provisions of law as well as terms and conditions of the policy. It was further pointed out that

the evidence on record in form of police statement of injured, clearly states that jeep was used for hire and reward. Reliance was placed on the cross

examination regarding payment of fare by the deceased/injured persons occupying the jeep at the time of the accident. It was submitted that the

Tribunal has committed an error by not considering the statement obtained by the investigator which were exhibited. Moreover, witnesses have

admitted in cross examination that they have given statement before the investigator regarding payment of Rs. 100/Â? as fare to the driver of the jeep.

10.1) It was submitted by the learned advocate that in First Appeal No. 562/2019 arising out of MACP No. 884/2011, the deceased was a bachelor,

therefore, the Tribunal ought to have deducted Â½ for the personal expenses as per the decision of the Apex Court in case of Sarla Verma(Smt.) and

others v. Delhi Transport Corporation reported in (2009) 6 Supreme Court Cases 121 and National Insurance Company Limited. v/s. Pranay Sethi and

ors reported in 2017(3) GLH 536. It was similarly submitted that in the First Appeal No. 579/2019 arising out of MACP No. 879/2011 also, the

Tribunal ought to have deducted Â½ for the personal expenses instead of 1/3rd as the deceased was a bachelor.

11. On the other hand, learned advocate for the respondentsÂclaimants submitted that the impugned judgment and award passed by the Tribunal

holding the appellantÂinsurance company liable for payment of compensation is just and proper as the impugned judgment and award is passed after

considering the evidence on record. He relied upon RC book at Exh.67 and insurance policy at Exh.68 and submitted tha the Tribunal has rightly come

to the conclusion that the appellant has failed to prove that deceased/injured persons were passengers for hire and reward in private vehicle. 11.1)

Learned advocate for the claimants submitted that the claimants are entitled to compensation and if the Court comes to the conclusion that

deceased/injured persons travelling in jeep were persons travelling by payment of fare in private vehicle then insurance company be directed to make

the payment of the awarded amount to the claimants and recover the same from the insured in the execution proceedings. He placed reliance upon

the decision of Apex Court in case of Manuara Khatun and others v. Rajesh Kumar Singh and others reported in 2017 ACJ 1031.

12. Having considered the submissions made by the learned advocate for the respective parties and after taking into consideration the documentary

and oral evidence on record, it emerges that the appellantÂinsurance company has not challenged the impugned judgment and award either on the

negligence or on the count of quantum determined by the Tribunal, except in two appeals i.e. First Appeal No. 562/2019 arising out of MACP NO.

884/2011 and First Appeal No. 579/2019 arising out of MACP No. 879/2011 wherein 1/3rd was deducted for personal expenses instead of Â½ by the

Tribunal though the deceased were bachelors.

13. With regard to the liability of the insurance company, the Tribunal has discussed the issue at length in paragraph no. 18 of the impugned judgment

and award. The Tribunal has considered Exh. 45 to 49, statements taken by the investigator of the appellant insurance company wherein it is stated by

the injured claimants that they had paid Rs. 100/Â towards fare to the driver of the jeep for travelling. It is also not in dispute that the insurance policy

at Exh.68 is a private car package policy. The Tribunal however, thereafter, discarded the statements at Exh. 45 to 49 on the ground that it is not

revealed in such statements on which place, such statements were recorded. The Tribunal further held that only in statements at Exh. 46 and 49, it is

stated that the jeep was hired by payment of Rs. 100/Â towards fare. The Tribunal therefore, came to the conclusion that in absence of any evidence

to prove that the deceased/injured persons have paid fare of Rs.100/Â for travelling in jeep, it cannot be believed that jeep was hired by the occupiers.

The Tribunal has also relied upon the cross examination of Dhaval Giteshgiri Goswami and Vipulbhai Rajubhai Prajapati at exh. 46 and 49

respectively, wherein it is denied by both the persons that they have paid fare of Rs. 100/Â for travelling from Detrajpur to Mahudi. Such cross

examination was made by original owner of the jeep. The Tribunal therefore, came to the conclusion that the report of the investigator of the

insurance company cannot be believed in absence of cross examination of such investigator. The Tribunal therefore, held that the insurance company

was liable to make payment of compensation.

14. On perusal of the impugned judgment and award as well as the documents produced on record, it appears that the Tribunal has committed an error

by holding that the evidence produced on record by the investigator and the statements at Exh. 45 to 49 cannot be believed. On the contrary, such

statements were not controverted by the claimants in any manner whatsoever inasmuch as the deceased/injured persons were travelling as

passengers by payment of fare in the offending vehicle and therefore, the appellant insurance company is liable to be exonerated as held by the

various decisions of the Apex Court.

15. Moreover, the Apex Court in case of Parminder Singh v. New India Assurance Co. Ltd & Ors rendered in Civil Appeal No.5123/2019 has also

taken a similar view, wherein it is held as under :

â??7. On the issue of liability to pay the compensation awarded, we affirm the view taken by the High Court that the Respondent â?" Insurance

Company is absolved of the liability to bear the compensation, as evidence has been produced from the office of the Regional Transport Office to

prove that the drivers of the two offending trucks were driving on the basis of invalid driving licenses. It is also relevant to note that the owners and

drivers of the offending trucks have not appeared at any stage of the proceedings, including this Court. 7.1. This Court in Shamanna & Ors. v. The

Divisional Manager, The Oriental Insurance Co. Ltd. & Ors.(2018) 9 SCC 650, held that if the driver of the offending vehicle does not possess a valid

driving license, the principle of â??pay and recoverâ?? can be ordered to direct the insurance company to the pay the victim, and then recover the

amount from the owner of the offending vehicle.

7.2. We deem it just and fair to direct the Respondent â?" Insurance Company to pay the enhanced amount of compensation as indicated in Para. 6

above, to the Appellant within a period of 12 weeks from the date of this judgment. The Respondent â?" Insurance Company is directed to make out a

Demand Draft in the name of the Appellant, which can be used for his care for the rest of his life. The Respondent â?" Insurance Company is entitled

to recover the amount from the owners and drivers of the two offending trucks.â??

16. Reliance placed on the decision of the Apex Court in case of Manuara Khatun and others v. Rajesh Kumar Singh and others (supra) by the

learned advocate for the respondentsÂ?claimants is also required to be applied in facts of the present case, wherein the Apex Court has held as under :

â??14 The only question, which arises for consideration in these appeals, is whether the appellants are entitled for an order against the Insurer of the

offending vehicle, i.e., (respondent No. 3) to pay the awarded sum to the appellants and then to recover the said amount from the insured (owner of

the offending vehicleÂ?Tata Sumo)Â? respondent No.1 in the same proceedings.

15. The aforesaid question, in our opinion, remains no more res integra. As we notice, it was subject matter of several decisions of this Court rendered

by three Judge Bench and two Judge Bench in past, viz., National Insurance Co. Ltd. vs. Baljit Kaur & Ors., (2004) 2 SCC 1, National Insurance Co.

Ltd. vs. Challa Upendra Rao & Ors., (2004) 8 SCC 517, National Insurance Co. Ltd. vs. Kaushalaya Devi & Ors., (2008) 8 SCC 246, National

Insurance Co. Ltd. vs. Roshan Lal, [Order dated 19.1.2007 in SLPÂ© No. 5699 of 2006], and National Insurance Co. Ltd. vs. Parvathneni & Anr.,

(2009) 8 SCC 785.

16 This question also fell for consideration recently in Manager, National Insurance Company Limited vs. Saju P. Paul & Anr., (supra) wherein this

Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While

allowing the appeal filed by the Insurance Company by reversing the judgment of the High Court, it was held on facts that since the victim was

travelling in offending vehicle as ""gratuitous passenger"" and hence, the Insurance Company cannot be held liable to suffer the liability arising out of

accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors

arising in the case, issued the directions against the Insurance Company to pay the awarded sum to the claimants and then to recover the said sum

from the insured in the same proceedings by applying the principle of â??pay and recoverâ??.

17 Justice R.M. Lodha (as His Lordship then was and later became CJI) speaking for the Bench held in paras 20 and 26 as under:

â??20. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the Insurance

Company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (Respondent 2 herein).

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 on 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 1Â?

8Â2011 (National Insurance Co. Ltd. vs. Saju P. Paul, SLPÂ© 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).â??

18 The facts of the case at hand are somewhat identical to the facts of the case mentioned supra because here also we find that the deceased were

found travelling as â??gratuitous passengersâ? in the offending vehicle and it was for this reason, the insurance companies were exonerated. In Saju

P. Paulâ??s case (supra) also having held that the victim was â??gratuitous passengerâ?, this Court issued directions against the Insurer of the

offending vehicle to first satisfy the awarded sum and then to recover the same from the Insured in the same proceedings.

19 Learned counsel for respondent No. 3 (United India Insurance Company Ltd.), however, contended that the facts of the case at hand are not

identical to the one involved in the case of Saju P. Paul (supra) and hence the law laid down therein cannot be applied to the facts of the case at hand.

Learned counsel pointed out that firstly, the awarded compensation in this case is quite substantial and secondly, it is not yet paid to the claimants.

Learned counsel also submitted that since the question involved herein is referred to a larger Bench and hence this Court should not give such

directions, as prayed by the appellants, against the Insurance Company.

20 We find no merit in any of the submissions. Firstly, as mentioned above, we find marked similarity in the facts of this case and the one involved in

Saju P. Paulâ??s Case (supra). Secondly, merely because the compensation has not yet been paid to the claimants though the case is quite old (16

years) like the one in Saju P. Paulâ??s Case (supra), it cannot be a ground to deny the claimants the relief claimed in these appeals. Thirdly, this

Court has already considered and rejected the argument regarding not granting of the relief of the nature claimed herein due to pendency of the

reference to a larger Bench as would be clear from Para 26 of the judgment in Saju P. Paulâ??s case (supra). That apart, learned counsel for the

appellants stated at the bar that the reference made to the larger Bench has since been disposed of by keeping the issue undecided. It is for this

reason also, the argument does not survive any more.

21) It is for all these reasons, we find no good ground to take a different view than the one consistently being taken by this Court in all previous

decisions, which are referred supra, in this regard.â??

17. Learned advocate for the insurance company submitted that in First Appeal No. 562/2019 arising out of MACP No. 884/2011, the deceased being

a bachelor, the Tribunal ought to have deducted Â½ for the personal expenses. The Tribunal correctly adopted notional income at Rs.1500/Â per

month considering the fact that deceased was studying at the time of the accident. The Tribunal however, erred in deducting 1/3rd for the personal

expenditure of the deceased since the deceased was a bachelor. Therefore, Â½ is required to be deducted towards the personal expenditure of the

deceased in view of judgment in case of Pranay Sethi and ors (supra) and accordingly monthly income of the deceased would come to Rs. 750/Â?

[Rs.1500ÂRs.750/Â (Â½ of Rs.1500)] and yearly income would come to Rs.9000/Â(Rs.750x12). The Tribunal correctly adopted multiplier of 18

considering the age of the deceased to be 16 years and 7 months, relying on judgment in case of Sarla Verma (supra) and accordingly Rs.1,62,000/Â?

(Rs.90000x18) is awarded to the claimants under the head of loss of dependency benefits. The Tribunal has correctly awarded Rs. 45,000/Â under

the conventional heads. Thus the total compensation payable to the claimants would be Rs.2,07,000/Â. (Rs.1,62,000 +Rs.45,000). The appeal of the

insurance company is allowed in part. The judgment and award of the Claims Tribunal is modified. The compensation of Rs.2,61,000/Â awarded by

the Claims Tribunal to the claimants is reduced to Rs.2,07,000/Â. The claimants are therefore entitled to receive compensation of Rs. 2,07,000/Â with

interest at the rate of 9% from the date of filing the claim petition till actual realisation and proportionate cost. The appellant insurance company has deposited the entire awarded amount pursuant to order passed by this Court. Tribunal shall now recover an amount of Rs.54,000/Â (Rs.2,61,000Â?

Rs.2,07,000) from the invested amount and refund the same to the appellant insurance company.

18. Similarly in First Appeal No. 579/2019 arising out of MACP No. 879/2011, the Tribunal has deducted 1/3rd for the personal expenses though the

deceased was a bachelor. The Tribunal correctly adopted notional income at Rs.3,000/Â per month considering the fact that deceased was studying at

the time of the accident. The Tribunal however, erred in deducting 1/3rd for the personal expenditure of the deceased since the deceased was a

bachelor. Therefore, Â½ is required to be deducted towards the personal expenditure of the deceased in view of judgment in case of Pranay Sethi and

ors (supra)and accordingly monthly income of the deceased would come to Rs. 1500/Â [Rs.3000ÂRs.1500/Â (Â½ of Rs.3000)] and yearly income

would come to Rs.18,000/Â(Rs.1500x12). The Tribunal correctly adopted multiplier of 18 considering the age of the deceased to be 18 years and 2

months, relying on judgment in case of Sarla Verma (supra) and accordingly Rs.3,24,000/Â(Rs.18000x18) is awarded to the claimants under the head

of loss of dependency benefits.

The Tribunal has correctly awarded Rs. 5,83,660/Â towards medical expenses on the basis of medical bills produced on record. The Tribunal has

correctly awarded Rs. 45,000/Â under the conventional heads. Thus the total compensation payable to the claimants would be Rs.9,52,660/Â?

(Rs.3,24,000 + Rs. 5,83,660 + Rs.45,000). The appeal of the insurance company is allowed in part.

The judgment and award of the Claims Tribunal is modified. The compensation of Rs.10,60,660/Â awarded by the Claims Tribunal to the claimants is

reduced to Rs.9,52,660/Â. The claimants are therefore entitled to receive compensation of Rs. 9,52,660/Â with interest at the rate of 9% from the

date of filing the claim petition till actual realisation and proportionate cost. The appellant insurance company has deposited the entire awarded amount

pursuant to order passed by this Court. Tribunal shall now recover an amount of Rs.1,08,000/Â? (Rs.10,60,660Â?Rs.9,52,660) from the invested amount

and refund the same to the appellant insurance company.

19. In view of the foregoing discussions, the First Appeals are partly allowed. The

impugned judgment and award is modified to the extent that the

appellant Âinsurance company is exonerated from liability to make payment of compensation. However, the appellantÂinsurance company is directed

to pay the awarded sum to the claimants and thereafter, it would be entitled to recover the entire awarded amount from the ownerÂinsured of the

offending vehicle jeep respondent no.4 in this very proceedings by filing execution petition against the insured.

20. First Appeals as well respective Civil Applications stand disposed of accordingly.

