
(2008) 07 BOM CK 0030
In the Bombay High Court
Case No : F.A.O. No. 395 of 2001

United India Insurance Co. Ltd.

APPELLANT

Vs

Rehana Begum and Others

RESPONDENT

Date of Decision : 24-07-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 163A, 166, 170

Citation : (2009) ACJ 2580

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : S.N. Dhanagare, for the Appellant; A.J. Pophaly and S.Y. Deopujari, for the Respondent

Judgement

S.R. Dongaonkar, J.—By this appeal, the appellant United India Insurance Co. Ltd., is seeking exception to the judgment and award passed by the Member, Motor Accidents Claims Tribunal, Nagpur in Claim Petition No. 74 of 1995, by which the claim petition of respondent Nos. 1 to 7 u/s 163-A of the Motor Vehicles Act, 1988, was allowed and the respondent Nos. 1 and 2, i.e., present appellant and the respondent No. 8 were directed to pay the compensation of Rs. 5,30,000 jointly and severally along with the interest, etc., besides the costs.

2. Brief facts leading to this appeal can be stated thus:

One Ashfaque Abdul Gaffar Ansari, the husband of respondent No. 1 and father of respondent Nos. 2 to 7 was returning to home on 23.10.1995 by his scooter. One truck bearing registration No. MH 31-4157, owned by respondent No. 8 and insured with the appellant, dashed against him, resulting in his death. The respondent Nos. 1 to 7, i.e., applicants claimed that he was the only earning member in the family. His age at the time of death was 43 years. He was drawing monthly salary of Rs. 5,164. The claim application was preferred u/s 163-A of Motor Vehicles Act and compensation to the tune of Rs. 6,00,000 was claimed. It was alleged that the driver of the truck was negligent in driving the same which had caused the death of the said Ashfaque. The details as required

were furnished in the petition.

3. The insurance of the said vehicle (truck) was admitted. However, it was contended by the appellant that the truck was driven by one Anthony Philip Fernandez, who in fact was the "cleaner" of the said truck. It was claimed that authorised driver was one Mohammad Kalim, however, at the time of accident, he was not driving the said truck, but at that time Anthony Philip Fernandez, the cleaner was driving the said truck without the consent of the said driver. Therefore, according to the appellant, there was breach of conditions of policy and as such the insurance company is not liable to pay compensation. The owner of the truck, i.e., the present respondent No. 8 did not appear and contest the claim, so he was proceeded ex parte.

4. The learned trial Judge recorded the evidence led by the claimants, i.e., of the respondent No. 1 herself and one witness Anant Fanibhare of Electricity Department, who had come to depose about the nature of services of the deceased Ashfaq and his monthly emoluments. The respondents therein did not lead any evidence. The learned Member of the Motor Accidents Claims Tribunal came to the conclusion that petition should partly succeed in view of the findings recorded by him. He has held that deceased Ashfaq had died due to vehicular accident involving truck bearing registration No. MH 31-4157 owned by respondent No. 8 herein and insured with appellant. He also found that the age of the deceased was 45 years, 9 months and 22 days. His income was around Rs. 5,000 per month and the liability of paying the compensation was with the appellant and respondent No. 8. He applied the multiplier of 13 and found that the present appellant and respondent No. 8 are liable to pay compensation of Rs. 5,30,000 jointly and severally with interest at the rate of 9 per cent per annum from the date of petition. This award dated 3.5.2001 is under challenge in this appeal.

5. Mr. S.N. Dhanagare, learned Counsel for the appellant has submitted that the appellant is not liable to pay the compensation. According to him, there was breach of conditions in respect of insurance policy, i.e., the truck should have been driven by the authorised driver and as it is not the case here, the insurance company would not be liable to pay compensation. It is also submitted by him that the panchnama of the place of accident and AA Form, Exh. 38, does not show that the truck was driven by the authorised driver. According to him, in fact the driver of the said truck who was driving the truck at the relevant time had died in the accident. The panchnama shows the name of the driver as Anthony Philip Fernandez, whereas the A A Form shows the name of Mohammad Kalim as driver of the said truck. According to him, the owner of the said truck has purposefully remained absent in the proceeding. Therefore, the fact that the said truck was being driven by authorised driver at the time of accident could not be established. It was duty of the claimants to prove that the truck was driven by authorised driver at the time of accident and then only the liability on the insurance company can be fastened. He has further submitted that as the claim

was u/s 163-A of the Motor Vehicles Act, the compensation could not be awarded taking into account the income of deceased for consideration of more than Rs. 40,000 per annum. As per the Second Schedule in respect of Section 163-A of the Motor Vehicles Act, i.e., awarding of compensation on the basis of structured formula cannot be awarded if the income of claimant is more than Rs. 40,000 per annum. According to him, if at all it is awarded, the Tribunal should have restricted the claim to the maximum as provided u/s 163-A of the Motor Vehicles Act. Therefore, according to him, the claim should have been restricted to Rs. 3,90,000 (with the multiplier of 15). Therefore, according to him, firstly, as there was breach of condition of the policy, the insurance company cannot be made liable for this claim and in the alternative, it is submitted that the claim should have been restricted to the maximum as can be allowed u/s 163-A of the Motor Vehicles Act, with the help of structured formula in the Second Schedule.

6. As against this, Mr. A.J. Pophaly, advocate for respondent Nos. 1 to 7 has contended that appellant insurance company is liable in the present case inasmuch as it or even the owner, i.e., respondent No. 8 did not discharge their burden of proof. According to him, the appellant insurance company could have called respondent No. 8 to enter into witness-box to state as to who was driving the truck at the relevant time and whether Anthony Philip was his authorised driver. Further, according to him, the insurance company could have led the evidence in denial and as this is not done, the insurance company would be liable for the present claim. As regards restriction of claim u/s 163-A of the Motor Vehicles Act, he has submitted that learned Member of the Motor Accidents Claims Tribunal has rightly awarded the compensation considering the income of the deceased. He has also submitted that in the deserving cases, the claim can be awarded more than what is provided u/s 163-A of the Motor Vehicles Act on the basis of that formula. According to him, as there was no cross-examination of the claimants' witnesses, learned Member of the M.A.C.T. has awarded the compensation rightly. Further, according to him, as the leave u/s 170 of the Motor Vehicles Act was not taken by the appellant, its appeal to reduce the compensation cannot be considered as defence only u/s 149(2) of the Motor Vehicles Act is available. Further, according to him, the multiplier as applied by learned Member, M.A.C.T. was correctly applied. Therefore, according to him, the appeal deserves to be dismissed.

7. Mr. S.Y. Deopujari, learned Counsel for respondent No. 8 has submitted that there was no issue framed by the learned Member, M.A.C.T. that driver of the truck was not holding valid driving licence, as such, the insurance company cannot take a stand that it is not liable to pay compensation unless someone of its side enters into witness-box to affirm the breach of conditions of the policy. As such, according to him, the insurance company was rightly held to be liable for the awarded compensation.

8. I had specifically asked the learned Counsel for the respondents as to whether the respondents would prefer to treat their application u/s 166 of the Motor

Vehicles Act, instead of Section 163-A of the Motor Vehicles Act, 1988. The specific submission that was made by the learned Counsel for the respondents was that this is application u/s 163-A of the Motor Vehicles Act. He also submitted that respondents do not want that their application should be allowed to be converted u/s 166 of the Motor Vehicles Act.

9. Turning to the first question as to whether the insurance company, i.e., the appellant can raise a defence that the said truck was not driven by the authorised driver at the time of accident and as such there was breach of terms and conditions of the policy and, therefore, insurance company is not liable to pay compensation to the respondents, suffice it to say that the appellant insurance company has not led any evidence, nor anybody from the side of the insurance company had entered into witness-box to depose as to what were the terms and conditions of the policy and how there was breach of the conditions. No doubt, as a general condition, the vehicle at the time of accident, for making the insurance company liable to the claim, needs to be driven by the authorised driver or driver having valid licence. Here, the instant case is such that although there is assertion on the part of the appellant that there was breach of condition as regards driving of the vehicle involved in the accident by authorised driver, no evidence was led to that effect. The insurance company did not summon the owner of the said truck, nor the driver of the said truck who was alive, to prove the said fact or for negating the obvious inference. This inaction on the part of the appellant would speak volumes against their defence. Such lapse on the part of insurance company would invite the liability as per award.

10. Learned Counsel for the respondents has rightly relied on the judgments of this court in *Rajan Baburao Patil v. Nagarbai Sadhu Pawar* 2007 (1) TAC 86; *Rajendra Raghunath Girme Vs. Pramila Dattu Surse and Others*, ; and *United India Insurance Co. Ltd. Vs. Kamal Maruti Darekar and Others*, . In my opinion, this defence is not available to the appellant in this appeal. Therefore, this contention of the appellant in this appeal is far from acceptance.

11. Needless to state that if the appellant is entitled to fasten the entire liability on respondent No. 8, i.e., the owner of the vehicle, the appellant would be required to satisfy the award in the first instance and then recover the same from the insured, i.e., the owner. It is necessary to make it clear that in the present circumstances of the case, such issue could not be decided for want of suitable evidence on record. In fact, the appellant and respondent No. 8 both have failed to lead suitable evidence on record to enable the learned Member, M.A.C.T. to decide this issue. Therefore, I find that first the appellant would be liable to satisfy the award and if at all the appellant claims that the liability to pay the compensation in this case was exclusively of respondent No. 8, i.e., owner of the vehicle, the appellant would be at liberty to take appropriate action available at law.

12. Turning to the question of compensation payable to respondent Nos. 1 to 7, it would be seen that claim petition of the respondents was u/s 163-A of the

Motor Vehicles Act and learned Counsel for respondent Nos. 1 to 7 has categorically submitted that he does not want to convert his petition u/s 166 of the Motor Vehicles Act, instead the respondent would prefer to stay in the compass of Section 163-A of the Motor Vehicles Act. Admittedly, the learned Member of the Tribunal has considered the income of the deceased to Rs. 5,000 per month for awarding the compensation. He has calculated the compensation as below. The monthly salary of deceased Ashfaque has been fixed at Rs. 5,000 and, therefore, by multiplying his monthly salary by Rs. 5,000 x 12 x 13, the gross figure comes to Rs. 7,80,000 and 1/3rd is to be reduced in consideration of the expenses which the deceased would have incurred towards maintaining himself had he been alive. This 1/3rd figure comes to Rs. 2,60,000. Thus, total compensation amount would be Rs. 5,20,000 to which a conventional figure of Rs. 10,000 by way of consortium will have to be added and this comes to Rs. 5,30,000 to which the claimants would be entitled in equal proportion. He has applied the multiplier of 13. He has accepted the income of the deceased at the rate of Rs. 5,000 per month, which is obviously more than Rs. 40,000 per annum. Therefore, his calculation of compensation is clearly not in accordance with the structured formula as laid down in Second Schedule (in respect of Section 163-A of the Motor Vehicles Act).

13. In this context, it is necessary to see the observations of the Supreme Court in *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* 2004 ACJ 934 (SC), in which the Apex Court has considered the earlier decision in *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, , on the subject of scope of Section 163-A of the Motor Vehicles Act. It is necessary to see the relevant observations which are in paras 39 to 56 of the said decision. Later in para 57 of the said judgment, it has been observed thus:

(57) We, therefore, are of the opinion that remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt or elect to go either for a proceeding u/s 163-A or u/s 166 of the Act, but not under both.

Further, in para 67 of the said judgment, it has been observed thus:

(67) We, therefore, are of the opinion that *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, , has correctly been decided. However, we do not agree with the findings in *Kodala (supra)*, that if a person invokes provisions of Section 163-A, the annual income of Rs. 40,000 shall be treated as a cap. In our opinion, the proceeding u/s 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is up to Rs. 40,000 can take the benefit thereof. All the other claims are required to be determined in terms of Chapter XII of the Act.

14. Here is the case where respondents opted categorically for being within the compass of Section 163-A of the Motor Vehicles Act. Therefore, in my opinion,

the respondents cannot claim compensation more than what is provided by the structured formula of the Second Schedule. I may add that even appellant insurance company has not asked for non suiting the respondent for not preferring claim u/s 166 of the Motor Vehicles Act being not entitled to maintain application u/s 163-A of Motor Vehicles Act. In view of the above, further this being benevolent welfare legislation, it would be rather injustice to ask for respondents to again treat their claim application u/s 166 of the Motor Vehicles Act, whose claim petition was of 1995. In my opinion, they can be granted relief of lowest amount, that can be awarded.

15. The respondents-claimants have contended that the compensation awarded by the learned Member, M.A.C.T. was correct. It is obvious that by considering the income of the claimants more than Rs. 40,000 per annum, i.e., Rs. 5,000 per month for calculation of compensation, Tribunal has landed into error. Therefore, the compensation, even if the provisions are considered to be for the benefit of the claimants, for the obvious reasons, more than what is provided under the Second Schedule cannot be granted. In any case, as the claim was not u/s 166 of the Motor Vehicles Act, it was facing rejection; for Section 163-A of Motor Vehicles Act remedy is not available for persons having income more than Rs. 40,000 per annum. As it is beneficial legislation, maximum provided under Second Schedule can be awarded because it would be less than what can be awarded u/s 166 of the Motor Vehicles Act, instead of relegating the parties again to go to the Claims Tribunal for fresh decision on claim petition, more so because, appellant itself has fairly made submission as regards quantum of compensation that can be paid u/s 163-A of the Motor Vehicles Act.

16. Turning to the contention of the learned Counsel for the respondents that as the leave u/s 170 of the Motor Vehicles Act was not claimed by the appellant, the appellant should not be allowed to object on the quantum of compensation, for which he relied on some authorities. Suffice it to say that in view of the decision of the Apex Court in Deepal Girishbhai Soni v. United India Insurance Co. Ltd. 2004 ACJ 934 (SC), obviously the impugned award would be illegal if that is allowed to stand. When it is challenged by the appellant, its legality has to be considered while deciding the appeal. Therefore, in my opinion, this contention would be available to the appellant even though leave u/s 170 of the Motor Vehicles Act was not sought in the compelling circumstances. Even otherwise, it was made respondent in the claim petition, therefore, without dilating on this aspect, suffice it to say that as calculated claim u/s 163-A of Motor Vehicles Act is less than the possible awardable claim u/s 166 of Motor Vehicles Act, in the instant case, in view of stand of the appellant, it can be granted.

17. Thus, it would be seen that award of the learned Member, M.A.C.T. suffers from illegality as regards determining the total compensation in the instant case. The proper compensation would be maximum that can be ordered u/s 163-A of the Motor Vehicles Act following the Second Schedule.

Thus, considering the age of deceased to be more than 45 years as found by the

learned trial Judge, the compensation payable as per the Second Schedule would be Rs. 4,80,000. The claim would be reduced by 1/3rd by taking into consideration the expenses which the victim would have incurred towards maintaining himself had he been alive. Hence, the compensation payable would be Rs. 3,20,000. Besides this, the claimants would be entitled to Rs. 2,000 for funeral expenses, Rs. 5,000 for loss of consortium and Rs. 2,500 for loss to estate. Thus, in all, the respondents would be entitled to Rs. 3,29,500. Needless to mention that there is no challenge to the shares of the claimants as determined by the learned Member, M.A.C.T. Therefore, the said order shall be maintained. In this view of the matter, I need not refer to the other authorities cited by the parties.

18. In sequel, this appeal will have to be partly allowed. Accordingly, it is partly allowed. The judgment and award dated 3.5.2001 passed by Member, Motor Accidents Claims Tribunal, Nagpur in Claim Petition No. 74 of 1995 is modified as under.

The appellant and the respondent No. 8 shall jointly and severally be liable to pay Rs. 3,29,500 as compensation together with interest at the rate of 9 per cent per annum from the date of filing the claim petition till its full and final payment. The distribution of the compensation shall be in proportion as ordered by the Tribunal.

Respondent Nos. 3 to 7 being minors, their shares shall be invested in any nationalised bank in F.Ds. till they become major with the direction that the interest accrued may be paid to their guardian, respondent No. 1, on preferring necessary application to withdraw that amount for the maintenance of the concerned respondents. The remaining amount, if any, deposited by the appellant which is not payable to the respondent Nos. 1 to 7 in pursuance to the above order shall be refunded to the appellant by accounts payee cheque to be drawn in its name. In the circumstances of the case, there would be no order as to costs.