

(2014) 09 GAU CK 0009
In the Gauhati High Court
Case No : MAC Appeal No. 79/2012

United India Insurance Company Limited	APPELLANT
Vs	
Urmila Chand	RESPONDENT

Date of Decision : 02-09-2014

Acts Referred:

Insurance Act, 1938 — Section 64UC
Motor Vehicles Act, 1988 — Section 147, 163-A, 173

Citation : (2015) 2 AnWR 190 : (2014) 3 GLD 128 : (2016) 1 GLT 211

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : S. Dutta, Advocate for the Appellant; G.P. Bhowmik, Sr. Advocate, S.S. Roy and K.K. Bhatta, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J.—This appeal is preferred u/s 173 of the Motor Vehicles Act, 1988 (for short, "the Act") against the judgment and award dated 11.11.2011 in MAC Case No. 125/2009 passed by the learned Member, Motor Accident Claims Tribunal, Tinsukia, awarding a sum of Rs. 11,82,000/- to the claimants/Respondent Nos. 1 to 4 herein, to be paid by the appellant Insurance Company with simple interest @ 4% p.a. w.e.f. from the date of filing of the petition on 31.10.2009 to 18.12.2009 and from the date of receipt of the copy of the judgment and order till full and final realization.

2. The claim petition came to be filed by the claimants, who are mother of the deceased Priyank Chand @ Shimpi as Claimant No. 1, wife of the deceased as Claimant No. 2 and two minor sons of the deceased as Claimant Nos. 3 and 4.

3. The case set out in the claim petition, in brief, is that on 27.02.2009 the deceased was travelling from Tinsukia to Makum by sitting in the front side seat of an Indica Car bearing Registration No. AS-23F-0934, which belonged to his friend Sri Gaurav Dutta. There was an accident earlier, involving 2 trucks bearing Registration No. AMB-0551 and AS-23F-0490. While police personnel was

maneuvering the said 2 trucks, the driver of the Indica car, namely, Niranjan Gogoi @ Rubul, driving the vehicle in a rash and negligent manner, at around 2 p.m., collided with the truck bearing No. AMB-0551, as a result of which Priyank Chand @ Shimpi died on the spot. In the claim petition, it is mentioned that Priyank Chand was the only earning member of the family consisting of his widowed mother, wife and the sons, who are the claimants and that the deceased was earning Rs. 12,692/- per month and that he was self-employed. The owner and driver of the Indica car were arrayed as Opposite Party Nos. 1 and 2. They did not file any written statement and the case proceeded ex-parte against them. The Opposite Party No. 3 is the United India Insurance Co. Ltd., i.e., the present appellant. The Opposite Party Nos. 4 & 5 are the owner and driver, respectively, of the truck bearing No. AMB-0551 and the Opposite Party No. 6 is New India Assurance Co. Ltd., i.e., the insurance company of the truck bearing No. AMB-0551. It appears that the driver of the truck, Opposite Party No. 5, had expired during the proceedings. The Opposite Party Nos. 3, 4 & 6 had contested the case by filing their respective written statement(s).

4. While denying the allegations made in the claim petition, the Opposite Party No. 3 set out a specific case that the liability of the insurance company, if any, will be restricted to the limit as provided under the Rules and terms and conditions of policy.

5. The Opposite Party No. 4, in his written statement, stated that the accident occurred solely due to rash and negligent driving of the Indica car and the claimant is not entitled to get any compensation from him. It is also asserted that the Opposite Party No. 5 was holding valid driving license at the time of accident and the truck was duly insured with the Opposite Party No. 6. The Opposite Party No. 6 also took the plea that due to rash and negligent driving of Indica car, the accident had taken place and it was in no way liable to pay compensation.

6. During trial, the claimants examined 2 witnesses, whereas opposite parties did not examine any witness.

7. The learned Tribunal, on the basis of materials on record, held that the driver of the Indica car drove the vehicle in a rash and negligent manner and dashed against the standing truck bearing Registration No. AMB-0551 and as a result, Priyank Chand @ Shimpi died in the accident.

8. From the documents exhibited, the learned Tribunal concluded that the deceased was in the business of sale and purchase of scraps. The learned Tribunal disbelieved Ext-8, which is an acknowledgment of Income Tax Return, filed by the deceased. The Tribunal recorded a finding that the claimants failed to prove that the deceased was having a monthly income of Rs. 12,692/-, but at the same time held that it would be reasonable to hold that monthly income of the deceased could not exceed Rs. 8,000/-. Age of the deceased was held to be 34 years on the date of the accident and accordingly, the learned Tribunal

adopted, for the purpose of computing compensation, multiplier of 16. Total loss of dependency was calculated by the learned Tribunal as under:-

"Yearly income of the deceased:-

Rs. 8,000/- X 12 = Rs. 96,000/-

In the light of Sarla Verma's case, the deduction is to be 1/4th only as the dependents/family members of the deceased are 4.

In view of the above case law, deduction of 1/4th of the total yearly income for personal living expenses of the deceased, the loss of yearly dependency would be = Rs. 96,000 X 1/4th = Rs. 24,000/-.

(Rs. 96,000/- - Rs. 24,000/-) = Rs. 72,000/-

Rs. 72,000/- X 16 = Rs. 11,52,000/-.

Besides the aforementioned amount, the claimants are entitled to Rs. 10,000/- (Rupees ten thousand) as funeral expenses, Rs. 10,000/- (Rupees ten thousand) as loss of consortium and Rs. 10,000/- (Rupees ten thousand) as loss of estate. Thus total compensation comes to Rs. 11,82,000/- i.e. (Rs. 11,52,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/-)."

9. The learned Tribunal also recorded the finding that the Indica car was under package policy and accordingly, it was ordered that the claimants should be entitled to receive compensation from the Opposite Party No. 3/appellant herein.

10. I have heard Mr. S. Dutta, learned counsel for the appellant, Mr. G.P. Bhowmik, learned Senior counsel for the claimants and Mr. K.K. Bhatta, learned counsel for the respondent No. 7. I have also heard Mr. K.N. Choudhury, learned Senior counsel, who appeared in this case as an amicus curiae.

11. Mr. Dutta has referred to, during the course of his submission, judgments in the cases of (i) Bhagyalakshmi and Others Vs. United Insurance Co. Ltd. and Another etc., , (ii) National Insurance Company Ltd. Vs. Balakrishnan and Another, , (iii) Oriental Insurance Co. Ltd. Vs. Rajni Devi and Others, .

12. The submission of Mr. Dutta is three-fold: (i) that the deceased was a gratuitous passenger in the Indica car and, therefore, he was not a "third party" in relation to the said vehicle and, thus, the claimants are not entitled to any compensation from the appellant Insurance Company; (ii) that the insurance policy, in question, limited the liability of the appellant-insurer in respect of unnamed passenger to a sum of Rs. 2 lakhs and, as such, at any rate, the Insurance Company cannot be fastened with any liability to pay compensation beyond Rs. 2 lakhs and, therefore, the judgment of the learned Tribunal, directing the insurance company to pay the entire amount of Rs. 11,82,000/-, is not sustainable in law; and (iii) that the learned Tribunal took the monthly income of the deceased at Rs. 8,000/- per month, without there being any acceptable evidence on record and, therefore, the compensation arrived at on

the basis of monthly income of Rs. 8,000/- is not sustainable in law. According to him, learned Tribunal should have taken notional income of Rs. 3,000/- per month. Mr. Dutta submits that though from the judgment in *Rajni Devi (supra)*, it is not clear as to whether the policy in question was an Act Policy or a Package Policy, the Apex Court, in terms of the contract of insurance, held that liability of the Insurance Company was confined to Rs. 1,00,000/-. He seeks to emphasise that terms of the contract as contained in the policy cannot altogether be lost sight of. Mr. Dutta has submitted that in *Bhagyalakshmi (supra)* and *Balakrishnan (supra)*, the Apex Court had not considered the terms of the policy limiting coverage in respect of an occupant in a car covered under comprehensive policy.

13. Mr. G.P. Bhowmik, learned counsel for the claimants has also relied on the aforesaid two judgments, namely, *Balakrishnan (supra)* and *Bhagyalakshmi (supra)* as well as in the judgment in the case of *Oriental Insurance Company Ltd. Vs. Surendra Nath Loomba and Others*, . He contends that there is no dispute that the policy in question was a Package Policy, also known as Comprehensive Policy, and in view of the judgments in the aforesaid cases, the terms and conditions contained in the policy would be of no consequence and the Insurance Company would be bound to pay compensation in respect of the liability towards an occupant in a car under Comprehensive/Package Policy. The learned Senior counsel submits that the Tribunal discarded Ext. 8 as not genuine, on perverse appreciation of the same and the learned Tribunal ought not to have rejected Ext.-8, which was the Income Tax Return filed by the deceased. Mr. Bhowmik also submits that as neither any cross-objection nor any appeal has been preferred, he cannot pray for enhancement of the award given by the learned Tribunal by taking the monthly income of the deceased as claimed in the claim petition.

14. However, countering the argument of Mr. Dutta that the monthly income of Rs. 8,000/-, as taken by the learned Tribunal, has no basis whatsoever, the learned senior counsel submits that a bare look at the evidence of CW 1, mother of the deceased, would go to show that she had deposed with regard to the monthly income of the deceased, which was stated to be Rs. 12,692/- and that he was also an income tax payee. No doubt CW 1 had also exhibited Ext. 8, which came to be disbelieved. It is submitted by him that there was no cross-examination whatsoever by the Insurance Company with regard to the income of the deceased and therefore, the income of the deceased virtually stands unassailed. Viewed from the said perspective, it is submitted by him that no interference with the finding of monthly income of Rs. 8,000/- is called for. In substance, he prays for upholding of the award in toto.

15. Mr. K.N. Choudhury, learned Senior counsel, who addressed the Court as an *Amicus Curiae*, supported the arguments advanced by Mr. Bhowmik. He submits that after the decision rendered in the case of *Balakrishnan (supra)*, what would be the liability of the insurer in respect of death of an occupant in a car relating to a Comprehensive/Package Policy, has crystallized. The learned Senior counsel

had placed reliance on Section 64UC of the Insurance Act, 1948 to submit that the Tariff Advisory Committee may control and regulate the rates, advantages, terms and conditions that may be offered by insurers in respect of any risk or of any class or category of risks and any such rates, advantages, terms and conditions shall be binding on the Insurance Companies. When the Insurance Regulatory and Development Authority (IRDA) had mandated that all Insurance Companies are bound to pay the compensation in respect of the liability towards the occupant in a car under Comprehensive/Package Policy, the Insurance Company could not have laid down any policy condition, in the first place, limiting the liability of the Insurance Company in respect of an occupant in a car. Even though the Insurance Company had put such a restrictive condition limiting the liability, the same will have no force in the eye of law, he emphatically urges.

16. Mr. K.K. Bhatta, learned counsel appearing for the respondent No. 7, New India Assurance Company Limited submits that in the attending facts and circumstances, the learned Tribunal rightly passed the award and no interference is called for.

17. I have considered the submission of learned counsel for the parties as well as the Amicus and have perused the materials on record.

18. I will first deal with the submission of Mr. Dutta that the learned Tribunal having disbelieved Ext. 8, was wholly wrong in assuming, out of nowhere, an amount of Rs. 8,000/- as the monthly income of the deceased.

19. From the evidence of CW 1, it is seen that the deceased was a registered contractor with the Indian Oil Corporation Limited (A.O.D.). There is no cross-examination whatsoever either by the Opposite Party No. 3, the appellant herein or by the other Insurance Company (Opposite Party No. 6) in the claim petition, with regard to the income of the deceased. There was no cross-examination with regard to Ext.-8 either. Only suggestion given in the cross-examination was that the monthly income of the deceased was shown on the higher side during his lifetime. That the deceased used to pay income tax was also not denied. The claimants' witness No. 2 was a service holder in Indian Oil Corporation Limited (A.O.D.) and his deposition is also to the effect that the deceased was earning around Rs. 15,000/- per month. In cross, he had stated that the deceased had discussed the matter of filing of Income Tax Return and that though he was not certain about the total income shown in the last Income Tax Return, his monthly income would have been around Rs. 14,000/- to Rs. 15,000/-.

20. CW 1 in her evidence in affidavit, amongst others, had stated as follows:-

"Ex. 2, 3, 4, 5 and 6 are sale orders of I.O.C. Ltd., (A.O.D.) Digboi in favour of my son and Ex. 7 is a letter of I.O.C. Ltd., (A.O.D.) Digboi. His monthly income was Rs. 12,692/- (Rupees Twelve Thousand Six Hundred Ninety Two) only approx., and he used to pay Income Tax also. His Permanent Account Number was AFRPCO8094. A copy of his Income Tax Return's Acknowledgement dtd. 26.2.2009 for the Assessment Year 2008-09 is filed in the case and is marked as

Exhibit No. 8."

21. Materials on record, thus, would go to show that a view could have been taken that the monthly income of the deceased was Rs. 12,000/- or so. It is, however, to be borne in mind that the claimants have not filed any appeal on their own and have also not taken any cross-objection. In an appeal filed by the Insurance Company laying challenge to the grant of a smaller relief, the claimants, in absence of any appeal or cross-objection filed by them, cannot seek higher relief. Such view finds support from the principle enunciated by the Apex Court in *Banarsi and Others Vs. Ram Phal*, . However, in view of the materials on record, it cannot be said that there was no basis for the learned Tribunal to conclude that the amount of monthly income of the deceased did not exceed Rs. 8,000/-. Accordingly, contention of Mr. Dutta is rejected.

22. The facts in *Rajni Devi (supra)* were to the effect that the deceased Janak Singh was riding a motor cycle along with another. An application u/s 163-A of the Act was filed claiming compensation and the Insurance Company had taken the plea that though the owner of the vehicle deposited extra amount of Rs. 50/- covering his personal insurance, the same would not cover the case of the pillion rider and that in any event, the owner of the vehicle is not a third party within the meaning of Section 147 of the Act. The Apex Court in *Rajni Devi (supra)* laid down the principle that where third party is involved, the liability of the Insurance Company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the Insurance Company would depend upon the terms thereon.

23. In *Bhagyalakshmi (supra)*, the Apex Court noted that the core question that arose for consideration before the High Court was as to whether the Insurance policy covered the risk of the passenger travelling in the car. The High Court had answered the said question in favour of the Insurance Company meaning thereby that the policy did not cover the risk of the passenger travelling in the car. The policy in question in the said case was a Package Policy. Apex Court observed that the schedule of the policy did not indicate the limits of liability and the contract of the insurance, if given the face value, covers the risk not only of the third party but also the persons travelling in the car including the owner thereof. The Apex Court, however, taking note of a large number of decisions it had rendered earlier wherein it was held that a passenger would not be a third party within the meaning of the Act in respect of Act Policy, opined that the matter required deeper scrutiny and accordingly, had referred the matter for consideration by a Larger Bench.

24. The Tariff Advisory Committee had been functioning as tariff regulatory authority till 31.12.2006 and from 1.1.2007, the IRDA has been functioning as the statutory regulatory authority and it is not in dispute that they are entitled to fix the tariff as well as the terms and conditions of the policies issued by all Insurance Companies.

25. The Delhi High Court, in the case of Yashpal Luthra and Another Vs. United India Insur. Co. Ltd. and Another, , had recorded the evidence of the competent authority of the Tariff Advisory Committee and IRDA and noted a Circular dated 16.11.2009 issued by the IRDA to the Chief Executive Officer of the Insurance Companies restating the factual position relating to the liability of the Insurance Companies in respect of pillion riders in two-wheelers and occupants in private cars under Comprehensive/Package Policy. The said Circular dated 16.11.2009 took note of two earlier Circulars, one dated 18.3.1978, relating to occupants carried in private cars effective from 25.3.1978 and the other dated 2.6.1986, regarding pillion riders on two-wheelers effective from the date of the Circular. The operative portion of the Circular dated 16.11.2009 reads as follows:

"The above circulars make it clear that the insured's liability in respect of occupant(s) carried in a private car and pillion rider carried on a two-wheeler is covered under the Standard Motor Package Policy. A copy each of the above circulars is enclosed for ready reference.

The authority vide Circular number 066/IRDA/F & U/Mar-08 dated 26.03.2008 issued under File and Use Guidelines has reiterated that pending further orders the insurers shall not vary the coverage, terms and conditions wording, warranties, clauses and endorsements in respect of covers that were under the erstwhile tariffs. Further the authority, vide Circular No. 019/IRDA/NL/S&U/Oct-08 dated 06.11.2008 has mandated that insurers are not permitted to abridge the scope of Standard Covers available under the erstwhile tariffs beyond the options permitted in the erstwhile tariffs. All general insurers are advised to adhere to the aforementioned Circulars and any non-compliance with the same would be viewed seriously by the Authority. This is issued with the approval of competent authority."

26. The Apex Court dealt with the aforesaid Circular dated 16.11.2009 at Paragraph 24 of Balakrishnan (supra) and the relevant extract of paragraph 24 is reproduced below:-

"24.The High Court had issued notice to the Tariff Advisory Committee and IRDA to explain the factual position as regards the liability of the insurance companies in respect of an occupant in a private car under the "comprehensive/package policy". Before the High Court, the competent authority of IRDA had stated that on 02.06.1986, the Tariff Advisory Committee had issued instructions to all the insurance companies to cover the pillion rider of a scooter/motorcycle under the "comprehensive policy" and the said position continues to be in vogue till date. It had also admitted that the "comprehensive policy" is presently called a "package policy". It is the admitted position, as the decision would show, the earlier Circulars dated 18.03.1978 and 02.06.1986 continue to be valid and effective and all insurance companies are bound to pay the compensation in respect of the liability towards an occupant in a car under the "comprehensive/package policy" irrespective of the terms and conditions contained in the policy. The competent authority of IRDA was also examined

before the High Court who stated that the Circulars dated 18.03.1978 and 02.06.1986 of the Tariff Advisory Committee were incorporated in the Indian Motor Tariff effective from 01.07.2002 and they continue to be operative and binding on the insurance companies."

27. In paragraph 26 of Balakrishnan (supra), the Apex Court further held as follows:-

"26. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "comprehensive/package policy". As the circulars have made the position very clear and IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "comprehensive/package policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a comprehensive/package policy, the liability would be covered. These aspects were not noticed in Bhagyalakshmi and, therefore, the matter was referred to a large Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."

28. The judgment in Balakrishnan (supra) was rendered on 20.11.2012. The judgment in Surendra Nath Loomba (supra) was also rendered thereafter on the same very date, holding the same view, though reported earlier in (2012) 13 SCC 792.

29. The position that emerges is that an Act Policy stands on a different footing from a Comprehensive/Package Policy. As the IRDA has stated that a Comprehensive/Package Policy covers the liability of the insurer for payment of compensation for the occupant in a car, there is no manner of doubt with regard to such liability of the Insurance Companies. However, the position would be different in case of an Act Policy. It is also manifest that all Insurance Companies are bound to pay the compensation in respect of the liabilities towards an occupant in a car under Comprehensive/Package Policy irrespective of the terms and conditions contained in the policy.

30. In this case, that the policy in question was a Package Policy is not in dispute. On a specific query of the Court, Mr. Dutta had submitted that it was a Package Policy and the Insurance Company is not assailing the finding of the learned Tribunal that it was a Package Policy.

31. Thus, there is no escape from the conclusion that under the Comprehensive/Package Policy, the Insurance Company will be bound to pay compensation in respect of the liability towards an occupant in a car even if there is any term in

the policy limiting the liability of the Insurance Company, as in the present case, and that such terms and conditions will have no bearing at all. Irrespective of the limitations imposed regarding liability in respect of individual passenger/occupant in a private car, the Insurance Company will have to pay the entire compensation amount granted in respect of such occupant.

32. In view of the discussions made above, I find no merit in the appeal and accordingly, the same is dismissed. The Court records its appreciation to Mr. K.N. Choudhury, learned Senior counsel for the assistance rendered.

33. At this stage, Mr. Dutta submits that he may be allowed to withdraw the initial deposit of Rs. 25,000/- made at the time of filing of the appeal so that the entire amount of the compensation can be paid before the learned Tribunal.

34. The appellant is allowed to withdraw the amount deposited before the Registry of this Court.

35. The Registry will send back the records.