

(2023) 11 SHI CK 0043

In the High Court Of Himachal Pradesh

Case No : First Appeal Order (MVA) No. 349 Of 2014

United India Insurance Company Ltd

APPELLANT

Vs

Krishna Devi And Another

RESPONDENT

Date of Decision : 10-11-2023

Acts Referred:

Indian Penal Code, 1860 — Section 279, 337, 338

Motor Vehicles Act, 1988 — Section 2(i), 96(2)(b)(i), 149(2), 149(2)(a)(i)(a), 174

Citation : (2023) 11 SHI CK 0043

Hon'ble Judges : Rakesh Kainthla, J

Bench : Single Bench

Advocate : Dr. Lalit K. Sharma, G.R. Palsra, Leena Guleria

Final Decision : Allowed

Judgement

Rakesh Kainthla, J

1. The present appeal is directed against the award dated 31.5.2014, passed by the learned Motor Accident Claims Tribunal-II, Mandi (hereinafter referred to as 'MACT'), vide which the claim petition filed by the respondent no.1 (claimant before the learned MACT) was allowed and the compensation of Rs. 3,98,730/- was awarded along with interest @7.5% per annum from the date of filing of the petition till deposit of the amount. (Parties shall hereinafter be referred to in the same manner as they were arrayed before the learned Trial Court for convenience).

2. Briefly stated, the facts giving rise to the present appeal are that the claimant filed a claim petition before learned MACT seeking compensation of Rs. 15,00,000/- for the injuries sustained by her in a motor vehicle accident involving the vehicle bearing registration no. HP-34A-1100. It was asserted that the claimant and other passengers hired a Jeep bearing registration no. HP-34A-1100 for carriage of their luggage and goods on 29.3.2007. They boarded the vehicle as owners and caretakers of the goods from Nagwain to

Panarsa. When the Jeep reached Takoli, the driver lost control of the vehicle and hit a tree on the roadside. The Jeep fell down. The claimant and other passengers sustained multiple injuries in the accident. The claimant was taken to the Government Hospital, Kullu, where she remained admitted till 30.3.2007. She was referred to IGMCH Shimla for further treatment, where she remained admitted from 30.3.2007 to 23.4.2007. The matter was reported to the Police and FIR No. 47/2007 was registered in Police Station, Aut, District Mandi, H.P. for the commission of offences punishable under Sections 279, 337 and 338 of IPC. The petitioner was an agriculturist and a homemaker. She is unable to do anything after the accident. She was earning Rs. 5,000/- earlier and is unable to earn anything after the accident. She had spent more than Rs. 1 lac on her treatment, attendant, taxi fare, special diet etc. The accident had taken place due to the negligence of respondent no.1. The vehicle was duly insured with respondent no. 2. Both the respondents are liable to pay compensation to the claimant. Hence, the petition.

3. The petition was opposed by respondent no.1 by filing a reply. It was admitted that the accident had taken place but it was denied that the accident occurred due to the negligence of respondent no.1. It was asserted that the cows appeared in front of the vehicle and the accident occurred while trying to save them. It was also admitted that the claimant had hired the vehicle from Nagwain to Panarsa. It was asserted that there was no negligence on the part of respondent no.1. Hence, it was prayed that the petition be dismissed.

4. Respondent No. 2 filed a separate reply, taking preliminary objections regarding the vehicle not being insured with respondent no. 2, the claimant being a gratuitous passenger, and the vehicle being driven without a valid driving licence, registration certificate and other documents in violation of the terms and conditions of the Insurance Policy. The contents of the petition were denied on merits. It was asserted that excessive compensation has been sought by the claimant. The claimant was a gratuitous passenger and the insurer is not liable to pay any compensation to her. Hence, it was prayed that the petition be dismissed.

5. Separate rejoinders denying the contents of the replies filed by respondents no.1 and 2 and affirming those of the petition were filed.

6. The following issues were framed by learned MACT on 24.11.2010:-

1. Whether the respondent no.1 was driving the vehicle bearing registration no. HP-34A-1100 in a rash and negligent manner, as alleged? OPP.

2. Whether the petitioner had suffered injuries in an accident involving the vehicle bearing registration no. HP-34A-1100 due to rashness or negligence of the respondent no.1, as alleged? OPP.

3. Whether the petitioner is entitled for compensation to the extent of Rs. 15,00,000/-, if so, who is liable to pay this compensation? OPP

4. Whether the petitioner was a gratuitous passenger in the vehicle, if so, its

effect, as alleged? OPR-2.

5. Whether the driver was not having a valid and effective driving licence, if so its effect, as alleged? OPR-2.

6. Whether the vehicle was being driven in violation of the terms and conditions of the insurance policy and the provisions of the Motor Vehicle Act, as alleged? OPR-2.

7. Relief.

7. The parties were called upon to produce the evidence and the claimant examined Dr Sandeep Vaidya (PW-1), HC Khem Chand (PW-2), Durga Singh (PW-3), Prem Singh (PW-4), Dr. Anil Joshi (PW-5) and herself (PW-6). Respondent No.1 examined himself (RW-1).

8. Learned MACT held that it was not disputed that respondent no.1 was driving the vehicle and the claimant was present in the vehicle at the time of the accident. The income of the claimant was taken as Rs. 1800/- per month. The claimant had sustained 60% permanent disability and after applying the multiplier of 15, she was held entitled to Rs. 1,94,400/- towards the loss of income. She was also held entitled to Rs. 10,000/- towards medical expenses, transportation charges, and compensation for pain and suffering. The insurer was held liable to indemnify the owner as per the terms and conditions of the policy. Learned MACT answered issues no. 1 and 2 in the affirmative, issue no. 3 partly in affirmative, issues no. 4 to 6 in negative and allowed the petition.

9. Being aggrieved from the award passed by learned MACT, the present appeal has been filed asserting that 4-5 passengers were travelling with the driver of the Jeep. The Jeep was insured under a Private Car Package Policy. The claimant also asserted that she had hired the vehicle with her goods. The policy provided that a gratuitous passenger was not covered under it. Learned MACT erred in fastening the liability upon the insurer. Therefore, it was prayed that the present appeal be allowed and the award passed by learned MACT be set-aside.

10. I have heard Dr.Lalit K. Sharma, learned Counsel for the appellant/insurer and Mr. G.R. Palsra, learned counsel for respondent no.1/claimant and Ms Leena Guleria, Advocate, for respondent no.2/owner of the vehicle.

11. Dr. Lalit K. Sharma, learned Counsel for the appellant/insurer submitted that the use of the vehicle for hire or reward was excluded as per the terms and conditions of the policy. The policy was issued as a Private Car Package Policy, which means that it could not have been used for carrying any passenger or goods. The claimant asserted that she had hired the Jeep along with other persons, therefore, there was a violation of the terms and conditions of the policy and learned MACT erred in fastening the liability upon the insurer. Therefore, he prayed that the present appeal be allowed and the award passed against the insurer be set-aside.

12. Mr. G.R. Palsra, learned Counsel for respondent no.1/claimant supported the award passed by learned MACT and submitted that no interference is required with the same.

13. Ms. Leena Guleria, learned counsel for respondent no.2/owner submitted that there was no violation of the terms and conditions of the policy. The policy was a comprehensive policy which covered the risk of the passengers travelling in it. Therefore, she prayed that the present appeal be dismissed.

14. I have given considerable thought to the rival submissions at the bar and have gone through the records carefully.

15. The Insurance Policy (Ex.RX) was a Private Car Package Policy. Section 2(i) of the policy defines the liability to third parties and reads as under:-

"(i) death of or bodily injury to any person including occupants carried in the vehicle (provided such occupants are not carried for hire or reward) but except so far as it is necessary to meet the requirements of Motor Vehicles Act, the Company shall not be liable where such death or injury arises out of and in the course of the employment of such person by the insured."

16. The schedule provides the limitation as to use as under:-

"Limitations as to use

The Policy covers the use of the Vehicle for any purpose other than

- a) Hire or Reward
- b) Carriage of Goods (other than samples or personal luggage)
- c) Organized racing
- d) Pacemaking
- e) Speed Testing and Reliability Trials
- f) Use in connection with Motor Trade."

17. It is apparent from the bare language of the schedule and the limitation to the use that the Insurance Company had agreed to indemnify the insured in the event of an accident caused by or arising out of the use of the vehicle in respect of death or bodily injury to any person including occupants carried in the vehicle when such occupants are not being carried for hire or reward. This is as per Section 149 (2)(a)(i)(a) of the Motor Vehicles Act, which excludes the liability of the Insurance Company when the vehicle is used for hire or reward unless covered by a permit to ply the vehicle for hire or reward. It was laid down by this Court in J.B. Pipes vs. Madan Lal 2008 ACJ 574 that it is open to the insurer to exclude its liability when the vehicle is being used for hire or reward. It was observed:-

"8. Section 149(2) is very clear on the subject. It clearly lays down that it is open

to an insurer to defend a claim on the grounds of the breach of a policy condition excluding the use of a vehicle for hire or reward where the vehicle is not covered by a permit to ply for hire or reward. The expression, "where the vehicle is not covered by a permit to ply for hire or reward", includes a situation where the vehicle is being plied in an area which is outside the coverage of the route permit."

18. Chhattisgarh High Court also took a similar view in *Purshotam Gupta Vs. Mus. Mahjabin Rahman* 2012 AAC 839, wherein it was held:-

"20. Therefore, in view of the above facts and circumstances and on the basis of preponderance of probabilities, it stands established that the vehicle in question was given on hire by the appellant/owner to the deceased, who was going along with his wife and relatives or close acquaintance on a 10 days trip to Darjeeling and the story of the appellant/ owner accompanying the deceased was deliberately introduced only to show that the vehicle was not given on hire, but the deceased being a close friend of the appellant/owner, that the deceased along with his family members and the appellant/owner with his family was going on a trip to Darjeeling free of cost. Thus, it stands proved that at the time of the accident, the vehicle in question was being plied by the appellant/owner through his driver /respondent No. 6 Manoj Kacher in breach of terms and conditions of the insurance policy, by giving the vehicle on hire to the deceased."

19. It was held by this Court in *New India Assurance Company vs. Anil Kumar* 2000 (1) Shim.L.J. 666 that the insurance company is not liable to pay compensation in case of a private package policy when the vehicle is being used for hire or reward without a valid permit. It was observed:

"20. After analysing the factual and legal position for the purpose of deciding the present case, the vehicle is not covered by a permit to ply for hire or reward and it was a private vehicle not carrying any passenger for hire or reward. It is the owner of the vehicle herself who gave the vehicle/ allowed the vehicle to be used as a taxi to carry passengers for hire or reward and, therefore, it cannot be said that she has not committed a breach of the condition of the policy which is the same as the one not permitted by the statutory provisions. The appellant company has established that the breach was on the part of the insured and we find that it was the insured who was guilty of violating the terms or infringement of the contract by handing over a private vehicle for using it as a taxi for hire or reward which is a fundamental breach of specified condition of the policy and the exclusion clause under Section 96 (2) (b) (i) (a) shall expressly apply in the case in hand denying the respondent owner of the vehicle indemnification by the appellant company."

20. In the present case, the claimant had specifically asserted in para-24 of the claim petition that she had hired the vehicle from Nagwain to Panarsa for the carriage of their luggage and goods with other passengers. Respondent No. 1 also admitted in his reply that the claimant had hired the vehicle from Nagwain

to Panarsa. The claimant also stated in her proof affidavit that she had taken the vehicle on hire basis from Nagwain to Panarsa to carry the luggage. Respondent Vinay Kumar also stated in his cross-examination that the claimant was travelling in his Jeep with the luggage. Therefore, the parties never disputed that the vehicle was hired by the claimant.

21. It was submitted that the vehicle was hired for transporting the goods which is permissible. This submission cannot be accepted. The registration certificate was not produced to show that the vehicle was registered as a goods vehicle. The policy was taken as a private car package policy which excluded the use of the vehicle for carriage of goods as per the limitation as to use and hire or reward. Therefore, it was impermissible to carry any goods in the vehicle for hire or reward as per the policy. Learned MACT did not notice the terms and conditions of the policy and erred in fastening the liability upon the insurer.

22. Since there was a violation of the terms and conditions of the policy, therefore, the insurer was not liable to identify the insured. It was laid down by Calcutta High Court in National Insurance Company vs. Shila Debi (2019) 2 CalJ 395 that where the insurer is not liable to indemnify the insured due to violation of the policy, it can be directed to pay the compensation and recover the same from the insured. It was observed:

"17. The ratio of the judgment enunciated hereinabove succinctly settled that in a particular case where the insurer was able to prove a breach on the part of the insured pertaining to conditions of insurance policy, the insurer could not be made to escape its liability towards the insured unless such breach or breaches were fundamental in nature having the effect of contribution to the case of the accident. In the instant appeal, there left nothing in the evidence that a Maruti brand private car having been given on hire, driven by a driver, employed by the registered owner of the vehicle offered its contribution to the cause of the accident and it was so fundamental and patent in nature that it would operate as a good defence to repudiate the claim for award. The appellant/insurer in the given circumstances of the case is not remediless and the manner of resorting to remedy was specifically laid down there clarifying that to establish the proposition 'Pay and Recover', the money found due to the insurer could be recoverable on a certificate being issued by the Tribunal to the collector in the same process as required under Section 174 of the Act, as arrears of land revenue. The appellant/Insurance Company thus can be made to indemnify the claimant first irrespective of the nature vehicle being involved in an accident, and then may take recourse to recovery from the owner of the vehicle."

23. In the present case, the insurer has deposited the the amount and 50% of it has already been released to the claimant by the order of this Court. Therefore, it is a fit case where the claimant should not be directed to return the amount but the insurer should be directed to recover the same from the insured.

Final order:

24. Hence, the present appeal is allowed and the award passed by learned MACT, directing the insurer to indemnify the insured is set-aside and the claimant is held entitled to the payment of compensation from respondent no. 1. Since the amount has already been deposited, therefore, the insurer is granted liberty to recover the same from the insured.

25. The pending miscellaneous application(s), if any, also stand(s) disposed of.