HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

CIMA No. 304/2012
CMA Nos. 84/2014 & 521/2013

Date of decision:30.12.2014

Bajaj Allianz General Insurance Co. ltd. **vs.** Pushpa Devi and ors

Coram:

HON'BLE MR. JUSTICE JANAK RAJ KOTWAL-JUDGE

Appearing counsel:

For appellant (s): Mr. Vishnu Gupta, Advocate
For respondent(s): Mr. B. S. Manhas, Advocate

(i) Whether to be reported in Press, Journal/Media: Yes/No
(ii) Whether to be reported in Journal/Digest: Yes/No

1. This is insurer's appeal against judgment and award in a Motor Accident Claim case.

2. Heard. I have perused the record.

3. I may state, briefly, the facts leading to this appeal.

   (a) On 07.06.2008, deceased, Kunj Lal, was traveling by a tractor bearing chassis No. 92466, Engine No. 918003 (for short the offending tractor). Respondent No. 5, Surinder Singh, was on the wheel. The offending tractor met with accident and turned turtle near a place called Gordhan. The deceased died in this accident.

(b) Legal representatives of the deceased, respondents 1 to 3 herein, preferred a claim for compensation under section 166 of the Motor Vehicles Act (for short the Act) before the Motor Accident Claims Tribunal, Jammu (for short the Tribunal) against owner and driver of the offending tractor, herein respondents 4 & 5 and the insurer, herein appellant. They alleged that the accident occurred due to negligence of the driver of the offending tractor.

(c) Respondents 4 & 5 did not contest the claim. The appellant/insurer, however, defended its liability mainly on the ground that the terms and the conditions of the policy of insurance had been violated inasmuch as the deceased was traveling by the offending tractor as unauthorized passenger, whose risk was not covered under the policy and the offending driver at the time of accident was not holding a valid and effective driving licence for the reason that the licence held by him was not renewed and did not authorize him to drive tractor fitted with a trolly, which falls in the category of a transport vehicle.

(d) Learned Tribunal after completing the inquiry and appraisal of the evidence found that the

accident had occurred due to rash and negligent driving by the driver of the offending tractor and the deceased died as a result thereof. Learned Tribunal, therefore, awarded compensation of Rs. 4,93,000/ to the claimants under following heads:

1.	Loss of dependency=	Rs. 4,68000/
2.	Funeral expenses =	Rs. 5,000/
3.	Loss to estate =	Rs. 10,000/
4.	Loss of consortium =	Rs. 10,000/
	Total:	Rs. 4,93,000/

(e) In regard to the defence taken by the appellant/insurer, learned Tribunal held that the deceased was traveling as a labourer with the offending tractor. Learned Tribunal took note that the policy of insurance covered the legal liability for one person engaged in operation and maintenance of the vehicle and held further that a labourer falls in that category and risk to his life is covered under the policy. Learned Tribunal further held that the driving licence of the driver of the offending tractor was valid for driving light motor vehicle, light transport vehicle, public service vehicle and heavy goods vehicle but was not renewed after 29.12.2006. On this score, learned Tribunal concluded that the insurer has succeeded in proving that driving licence of the offending driver was not effective as on the date

of accident. Learned Tribunal, therefore, while relying upon Kusum Lata v. Satbir, AIR 2011 SC 1234, directed that the award shall be satisfied by the insurer with a right to recover the awarded amount from the insured/owner of the offending vehicle.

4. Emphasis in the submissions of Mr. Vishnu Gupta, learned counsel for the appellant, was against the pay and recover aspect of the impugned judgment and award. Mr. Gupta submitted that the appellant/ insurer having succeeded in proving breach of a condition of the policy of insurance, learned Tribunal should not have foisted liability to satisfy the award on the insurer. Mr. Gupta submitted that a Court or Claims Tribunal has no jurisdiction to foist liability of satisfying the award on the insurer with liberty to recover the amount from the insured. Mr. Gupta also sought to assail the finding of the learned Tribunal that the deceased having been engaged as a labourer with the offending tractor, risk to his life was covered under the insurance policy and that licence of the offending driver was valid for driving a light transport vehicle. In support of his contention that the deceased was traveling as unauthorized passenger, Mr. Gupta sought to draw support from the evidence rendered by respondent, Pushpa Devi, who is wife of the deceased

and PW Manzoor Hussain and submitted that the tractor having been attached with a trolly and deceased having been engaged as a labourer, risk to life of a labourer was not covered under the insurance policy.

5. Per contra, Mr. B. S. Manhas, learned counsel for the respondents/claimants supported the award. Mr. Manhas, while reading out the policy of insurance issued by the appellant, pointed out that it *inter alia* covered legal liability in respect of one person engaged for operation/maintenance of the tractor. He submitted that a person engaged as a labourer with a tractor cannot be taken as a person other than one having been engaged for operation/ maintenance of the tractor.

6. Having read and analyzed the evidence led by both the sides before the learned Tribunal, I am not persuaded, as I find no valid reason, to disagree with the conclusion recorded by the learned Tribunal on various issues of fact. Learned Tribunal has correctly examined the driving licence of the offending driver and found that it authorized him to drive light motor vehicle, light transport vehicle, public service vehicle and heavy goods vehicle. At the same time, learned Tribunal has rightly noticed that the licence was not renewed after

29.12.2006 and therefore, not valid and effective as on the date of the accident. Likewise, I am not persuaded to disagree with the finding recorded by the learned Tribunal that a person having been engaged as a labourer with a tractor would fall within the definition of a person meant for operation and maintenance of the tractor for the reason that his role would be loading, unloading and fitting of trollies and ploughs to the tractor, which are the activities connected with operation of a tractor. I have noticed that there is nothing in the evidence led before the learned Tribunal that the offending tractor at the time of accident was being used for any commercial purpose. Learned Tribunal has correctly taken note that the policy of insurance covered legal liability of the insured in respect of one person engaged for operation/maintenance of the tractor and held the deceased to be a person falling in that category.

7. Last question, but not the least, however, is, whether the learned Tribunal had the jurisdiction and was legally right in foisting the liability on the appellant/insurer to satisfy the award with liberty to recover the awarded amount from the insured/owner?

8. It is now well settled that in an appropriate case, where the insurer has issued the policy of insurance

but has succeeded in defending its liability by proving breach of a specified condition of the policy of insurance in terms of section 149(2) of the Act, the insure can still be directed to satisfy the award and to recover the awarded amount from the insured. In National Insurance Co. ltd v. Swaran Singh (2004) 3 SCC 297/ AIR 2004 SC 1531 the Supreme Court has observed that 'the liability of the insurance company to satisfy the decree at the first instance and to recover the awarded amount from the owner or driver thereof has been holding the field for a long time.' The Supreme Court, however, has 'hastened' to add in paragraph 102 of the reporting that (SC):

> "102…. the Tribunal and the court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner or driver of the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act . However, in the event, having regard to the limited scope of inquiry in the proceedings before the Tribunal it had not been able to do so, the insurance company may initiate a separate action therefore against the owner or the driver of the vehicle or both, as the case may be. Those exceptional cases may arise when the evidence becomes available to or comes to the notice of the

> insurer at a subsequent stage or for one reason or the other, the insurer was not given opportunity to defend at all. Such a course of action may also be resorted when a fraud or collusion between the victim and the owner of the vehicle is detected or comes to the knowledge of the insurer at a later stage."

The view taken by the Supreme Court in Swaran Singh's case has been referred to with approval lately in Kusum Lata v. Satbir Singh AIR (2011) SC 1234.

9. What prevailed with the learned Tribunal in directing the appellant/insurer to satisfy the award and recover the awarded amount from the owner of the offending vehicle is stated in the penultimate paragraph of the impugned judgment and award which reads:

> "Adverting to facts of present case petitioner are dependants of the deceased who was a poor labourer. If they are asked to run after the registered owner of the offending vehicle for recovery of the amount of compensation, it will amount to adding insult to their injury. Interests of justice will be met, if respondent No. 3, insurer is asked to pay the amount of compensation to the petitioners and thereafter recover the same from respondent No. 2, the owner of the vehicle in question."

10. I agree with the view taken by the learned Tribunal as I find no good reason to disagree. Besides, I find another good reason for upholding the order of the learned Tribunal. On reading of the impugned judgment and award, it is seen that even though the appellant/insurer had succeeded in proving and

learned Tribunal held that the driving licence of the offending driver, having not been renewed after 29.12.2006, was not valid and effective at the time of accident, neither has the appellant proved nor the learned Tribunal accorded consideration to the fact as to whether the breach of a specified condition of the policy of insurance was on the part of the insured/owner. To defend its liability under section 149(2) of the Act the insurer has to prove not only the breach of a specified condition of the policy of insurance but also that the breach had been on the part of the insured. The insurer has to prove by leading evidence that there was conscience breach on the part of the insured. This legal position is discernible in Swarn Singh (supra) where their Lordships have held that the insurance companies with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them. There is not even a whisper in the evidence led by the appellant/insurer that the owner of the offending tractor was aware of the fact that the driver had not got his licence renewed.

11. The insurance company in this case having failed to establish that breach of insurance policy, that is,

driving licence of the offending driver being not renewed as at the time of accident, was on the part of the owner of the offending tractor, I have my reservation in regard to learned Tribunal's allowance to the appellant/insurer to recover the awarded amount from the insured. However, this aspect of the impugned judgment and award having not been assailed, I would prefer not to devolve upon the same any more. Nonetheless I would say that appellant's grievance cannot be taken as well founded and hold that this is a fit case where the insurer should satisfy the award and avail the benefit of recovery as allowed by the learned Tribunal.

12. For all that said and discussed above, I hold that this appeal has no merit and dismissed the same.

13. Record of the Tribunal be remitted back along with a copy of this order.

(Janak Raj Kotwal)
Judge

Jammu:
30.12.2014
Karam