

IN THE HIGH COURT OF JHARKHAND AT RANCHI
(Civil Miscellaneous Appellant Jurisdiction)
M.A. No.218 of 2018

Branch Manager, Bajaj Allianz General Insurance Co. Ltd. 504,
Mahabir Tower Opp. Church Complex, Main Road, P.S. Hindpiri,
P.O. Ranchi, District-Ranchi (Opp. Party No.2)

.... Appellant(s)

Versus

1. Binita Topno wife of late Prakash Topno
2. Sunita Topno daughter of late Prakash Topno
3. Dashrath Topno son of late late Prakash Topno
4. Suraj Topno son of late Prakash Topno
5. Mushkan Topno daughter of late Prakash Topno
6. Ghogeya Topno @ Choseya Topno son of late Topa Topno
7. Muktak Topno wife of Ghoeya Topno

(Claimant Nos.2 to 5 are minors being represented through
respondent No.1 being their mother as their next friend) all
residing at Village-Leter, P.O. Ambapakhna, P.S. Raniya,
District-Khunti

(Applicants/Claimant Nos.1-7 respectively)

8. Pushpa Tirkey wife of Kamlesh Yadav, resident of village
Narekela P.O. Mamarla, P.S. Basia, District-Gumla (owner) Opp.
Party No.1) Respondent(s)

PRESENT

HON'BLE MR. JUSTICE PRADEEP KUMAR SRIVASTAVA

For the Appellant : Mr. Alok Lal, Adv.
Mr. Santosh Kumar, Adv.
For the Resp. Nos.1-7 : Mr. Kripa Shankar Nanda, Adv.
For the Resp. No.8 : Mr. N.K. Sinha, Adv.

JUDGMENT

C.A.V. ON 22/11/2023

Pronounced On 21 / 12 / 2023

Heard learned counsel for the parties.

2. Present miscellaneous appeal has been preferred under section 173(1) of the Motor Vehicle Act on behalf of the Bajaj Allianz General Insurance Company Limited, assailing the impugned award dated 21.11.2017 passed in Motor Accident Claims Case No.70 of 2012 passed by learned District & Additional Sessions Judge-VI-cum-P.O.,

MACT, Gumla, whereby the claimants namely, (1) Binita Topno (2) Sunita Topno (3) Dashrath Topno (4) Suraj Topno (5) Mushkan Topno (6) Ghogeya Topno and (7) Muktak Topno (Appellant Nos.2-5 are minors being represented through respondent No.1 being their mother as their next friend) have been awarded compensation to the tune of Rs.6,08,540/- along with interest @ 6 % per annum from the date of admission of the claim petition i.e. 20.09.2014 till its realization. The interim compensation paid, if any, under section 140 of the Motor Vehicle Act, 1988 shall be deducted therefrom.

3. The case of the claimants in short is that one Prakash Topno aged about 35 years who was the only earning member of the claimant's family met with an accident arising out of use of motor vehicle bearing temporary registration No.JH-01G(T)-4470/8930 and permanent registration No. JH-07D-3574 near village Bangru, P.S. Palkot Dist. Gumla at midnight on 25.12.2011 at NH- pitch road while driving the aforesaid bolero vehicle and died on spot. It is alleged that the deceased was employed by the owner of the above bolero vehicle namely Pushpa Tirkey and was earning Rs.6,000/- per month. The offending vehicle was insured with Bajaj Allianz General Insurance Company (O.P. No.2) on the relevant date of accident. The claimants have claimed compensation of Rs.6 lakhs with 9% interest, funeral cost and loss of consortium under section 166 of Motor Vehicle Act.

4. O.P. No.1 Pushpa Tirkey, the owner of the offending vehicle bearing temporary No. JH-01G(T)-4470/8930 and permanent registration No. JH-07D-3574 appeared and contested the case amongst others grounds that on the date and time of occurrence, the driver/deceased without permission of the owner went with the vehicle for his own work to visit his family/relative's house for observing festival and due to unskilled driving, the accident took place. It is further pleaded that since the offending vehicle was insured with the O.P. No.2 under valid insurance policy effective from 14.10.2011 to 13.10.2012, the whole liability is upon the insurance company.

5. O.P. No.2 Bajaj Allianz General Insurance Company Limited/present appellant in its written statement has specifically pleaded that on the date of alleged accident the deceased was not

holding a valid and effective driving license and he was also not qualified for obtaining such driving license and he was deliberately employed by the owner for plying the vehicle for carrying passengers also. Hence, there is clear cut violation of terms and conditions of insurance policy and the company is not liable to indemnify the insured and pay any compensation amount to the claimants. Moreover, the deceased driver can not be treated as third party rather he is agent of the owner/insured on this ground also insurance company is not liable to pay the compensation to the claimants. It is also pointed out that the offending vehicle was being plied without permanent registration.

6. On the basis of the parties, the learned Tribunal has settled following issues for adjudication:

- (1) Whether the deceased Prakash Topno(35 years) died while driving the impugned Bolero vehicle bearing Engine No.GHB4H21866, Chassis No. MA1XA2GHKB5J94126 Registration No.JH-01G(T)-4470 on the alleged date of accident 25-12-2011?
- (2) Whether the driver Prakash Topno died in the aforesaid accident due to unauthorized or rash, negligent and drunken driving of the vehicle or due to his own negligence?
- (3) Whether the driving License of deceased was fake and if so, is the same a valid defence for insurance company?
- (4) Whether third party includes the driver of the impugned vehicle
- (5) Whether the claimants are entitled to receive compensation as sought for and if so the quantum thereof?
- (6) From which O.P. the claimants are entitled to receive compensation?

Following witnesses have been examined on behalf of the claimants:-

C.W.-Pahna Barla

C.W.2-Jidan Topno

C.W.3-Jakarious Topno

C.W.4-Binita Topno, the claimant No.1 herself

Following documentary evidences have been adduced.

Ext.1-Certified copy of FIR of G.R. Case No.1155/2011

Ext.2-Certified copy of charge sheet No.38 of 2012 corresponding to G.R. Case No.1155/2011

Ext.3-Family Membership certificate.

Mark "X"-Photocopy of postmortem report of deceased Prakash Topno

Mark "X/I"-Photocopy of owner book of Pushpa Tirkey.

Mark "X/II"- Photocopy of Insurance Paper of Pushpa Tirkey

Mark "X/III"-Photocopy of driving license of Prakash Topno (bearing license No.9210/09 Pvt. Date of issue 18.06.2009, Mlcy+(M.V. Pvt.)

7. Although no witness has been examined on behalf of O.P. No.1-owner of the impugned vehicle, however, the following witnesses have been examined on behalf of O.P. No.2:-

OPW-1 Ankit Tripathi

OPW-2 Lalan Prasad Singh

8. The following documentary evidences have been adduced on behalf of the opposite parties:-

Ext.A- Owner Book of Pushpa Tirkey

Ext.B-Insurance paper of Pushpa Tirkey

Ext.C-Certificates of Temporary Registration of vehicle bearing Reg. No.JH-01G(T)-8930 & JH-01G(T)-4470

Ext.D-Retail invoice (dated 14-01-2011) of vehicle bearing Engine No.GHB4H21866, Chassis No. A1XA2GHKB5J9412.

Ext.E-Driving License of deceased Prakash Topno bearing No.9210/09

Ext.F- Computer generated copy of policy vehicle bearing Engine No.GHB4H21866, Chassis No. MA1XA2GHKB5J9412 along with terms and conditions

Ext.G- Copy of the D.L. No.9210/09 of driver of Bolero Santosh Kumar

Ext.H- Letter bearing No.2888 dated 14.09.2017 issued by District Transport Officer from District Transport Office, Ranchi

Ext.I & I/1- Original register of Anugyapati No.9201/09 issued in the name of Rajesh Chandra Mahato for Private License

Ext.J & J/1- Original register of Second Anugyapati No.9201/09 issued to driver Binesh Sahu for commercial license.

Mark "X" - Photocopy of the driving license of driver of Bolero Santosh Kumar for identification.

Mark "X/1" - Photocopy of the R.C. issued on 29-01-2012 for identification.

9. After considering the oral as well as documentary evidence of the parties, the learned Tribunal recorded findings that the deceased Prakash Topno died out of use of motor vehicle at the public place while he was driving the same and was employed by O.P. No.1(owner of the vehicle). The possibility of unauthorized driving and driving of vehicle in a drunken state has also been overruled. As regards the violation of terms and conditions of the policy which it was found that the driving license of the deceased was fake and forged, it was held that for the negligent driving of the vehicle, the employer will be liable for any accident. Hence, the Insurance Company may be fastened with liability to pay first award amount to the claimants, then to recover the same from the owner/insured of the vehicle. It was also found that the Insurance Policy(Ext.-F) is car package policy for which OD premium of Rs.13,906/- has been charged and the Basic Third Party Liability of Rs.2,750/-, as such liability of driver and other passengers is also included in the insurance policy. As regards, issue No.5, it was held that the deceased was 35 years old and he died leaving behind his wife, minor children and old parents, hence, applying the principles for calculation of award has passed the impugned award of Rs.6,08,540/- only along with interest @ 6 % per annum.

10. Learned counsel for the appellant assailing the impugned award has vehemently argued that the learned Tribunal has committed serious illegality by directing the appellant to pay the compensation to the claimants and recover it from the owner/insured. Whereas the witnesses examined by the appellant have been able to prove the driving license of the deceased was fake

and the insurer can not be liable to pay the victim of accident arising out of use of motor vehicle. It is further submitted that the general principle of law of torts is that the master is vicariously liable for the wrongful act of the servant causing injuries to a third person but in this accident case, the servant himself was rash and negligent in causing accident as such the insurer in any view of the matter can not be held liable to indemnify the insurer in any manner. In view of the above, principle of pay and recover does not apply in this case rather the owner alone may be fastened with liability to pay the compensation amount in this case. Therefore, impugned order is liable to be set aside.

11. On the other hand, learned counsel for the respondents have vehemently opposed the submissions raised by learned counsel for the appellant and has submitted that, learned Tribunal has considered every *pros and cons* of the case as well as terms and conditions of the insurance policy and other materials available on record and arrived at right conclusion that the claimants have also not separately filed any appeal challenging the award, hence, there is no merits in this appeal, which is fit to be dismissed.

12. In the instant appeal the sole point of contention is about exclusion of liability of the appellant on ground of violation of the terms and conditions of the policy and the deceased himself was negligent for driving the vehicle, he could not be treated as third party, hence, the insurance company can not be held liable to pay the compensation amount first and then to recover it from the insured but he is entitled for complete exoneration from the liability.

13. In the context of above contentions, learned counsel for the appellant has placed reliance on the following judgments:

(i) *Mohd. Hanif and Anr. vs. H.P. Road Transport Corp & Ors.* (2005) 13 SCC 694

(ii) *National Insurance Company Ltd. vs. Ashalata Bhowmik & Ors.* (2018) 9 SCC 801

(iii) *Tamil Nadu State Transport Corporation vs. Natarajan & Ors.* (2003) 6 SCC 137

(iv) *United India Insurance Co. Ltd. vs. Driver of Jeep NO. GJ-6-JJ-9875 not joined & Ors.* 2016 (4) TAC 180

(v) *Oriental Insurance Co. Ltd. vs. Smt. Brahmi & Ors.* 2016(0) Supreme (HP) 2071

(vi) *Pappu & Ors. vs. Vinod Kumar Lamba & Ors.* (2018) 3 SCC 208

14. I have gone through the aforesaid judgments and in the facts and circumstances, none of them are applicable in the preset case with exactitude. The most of the cases are pertaining to the case whether the insured was owner-cum-driver and there was policy conditions and payment of additional premium for the driver-cum-owner to the maximum extent of Rs.2 lakhs. In the instant case, the deceased was employed as a driver by its owner (O.P. No.1) for driving the vehicle, although in her written statement O.P. No.1/insured has emphatically stated that the driver/deceased took the vehicle without her consent for his own work along with his family for enjoying the festival and the accident happened due to unskilled driving of the vehicle, but did not specifically denied that deceased was not employed by her.

15. No oral or documentary evidence to substantiate the aforesaid plea was adduced by the owner/insured. The insurer can not take benefit of any plea taken by the insured unless and until it is proved. Therefore, the driving license of the deceased was found fake and forged is based on clear cut evidence of witnesses examined by O.P. No.2 and production of original register for issuance of driving license. The findings recorded by learned Tribunal in this regard has not been challenged by the owner/insured by filing any separate appeal which has attained finality.

16. From perusal of the computerized Insurance Policy which was issued by the appellant in respect of the offending vehicle, it appears that it is comprehensive Private Car Package Policy, in which additional premium has been paid for Employee-one person. There is no doubt that the deceased was driving offending vehicle at the relevant time of accident and due to his fault and negligence, the accident resulted in his death. Thus, as per terms and conditions of policy, the insurance company/appellant is liable to satisfy the award amount with interest and then to recover the same from the owner/insured.

17. In view of the above discussion and reasons, I am of the definite opinion that the insurance company is liable to pay the compensation for a Motor Vehicle Accident claim for a hired driver in the event of his death, even if the accident is caused due to negligence of the driver. This liability arises once the insurer has accepted additional premium to cover the liability of paid employee and to indemnify the vehicle's owner. Therefore, I do not find any merits in this appeal which stands dismissed.

18. The statutory amount deposited by the appellant-Insurance Company is directed to be returned.

(Pradeep Kumar Srivastava, J.)

High Court of Jharkhand

At Ranchi

Date: 21/12/2023

Pappu/A.F.R.