DIST. KAMRUP
ASSAM
CLAIMANT NO. 1 WIFE OF DECEASED REPRESENTED ON BEHALF OF CLAIMANT NO. 2
3
4 and 5 WHO ARE MINOR DAUGHTER AND SON OF THE DECEASED

Advocate for the Petitioner : MR. S DUTTA

Advocate for the Respondent : MR. P C DEY (R7)

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 27.06.2023
Date of Judgment & Order : 29.09.2023

JUDGMENT & ORDER (CAV)

Heard Mr. S. Dutta, learned Senior Counsel assisted by Mr. C. Sharma, learned counsel for the appellant. Also heard Mr. B. C. Das, learned Senior Counsel assisted by Mr. P. C. Dey, learned counsel for the respondent No. 7 and

Mr. D. K. Kalita, learned counsel for the respondent Nos. 1 to 6.

2. This is an appeal under Section 173 of the Motor Vehicle Act, 1988, against the judgment and order dated 20.01.2015, passed by the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, in MAC Case No. 859/2013.

3. The brief facts leading to this appeal is that on 23.01.2013, at about 6.10 a.m., at Tarabasa, Smti Lakhimai Teronpi (claimant) and her husband- Lt. Lakhan Singh Phangso was going from Bhaloghat towards their residence by a vehicle, bearing Registration No. AS-02A-3936 (Tata Indica), and when they reached Tarabasa, due to rash and negligent driving, the vehicle met with an accident and the vehicle dashed against a tree, on which the claimant- Lakhimai Teronpi sustained grievous injury on her person and her husband died on the spot. Accordingly, the claimant, along with her children and mother-in-law, filed the claim petition for compensation for the death of the deceased- Lakhan Singh Phangso.

4. The Insurance Company, accordingly, appeared and contested the case by filing their Written Statement with a specific plea that the policy issued in respect of the vehicle, bearing Registration No. AS-02A-3936, in favour of the insured, is a private car and the policy does not cover the occupants carried in the private car. To substantiate the said plea, the Insurance Company also adduced the evidence of one DW-1.

5. The learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, after hearing the arguments put forwarded by both the parties,

passed the judgment and order dated 20.01.2015 and awarded a sum of Rs. 12,17,800/- (Rupees twelve lakhs seventeen thousand eight hundred) only with interest @ 6% per annum from the date of filing the claim petition till its realization and directed the appellant/Insurance Company to pay the same within a period of 90 days from the date of order.

6. On being highly aggrieved and dissatisfied with the judgment and order dated 20.01.2015, passed by the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, in MAC Case No. 859/2013, the present appeal has been preferred by the appellant/Oriental Insurance Company Ltd.

7. It is stated that the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, erred in law as well as in facts while passing the impugned award of compensation and hence the same is liable to be set aside. The vehicle, bearing Registration No. AS-02-A-3936, was covered by a Private Car Act Policy and as such, the occupants carried in the private care are not covered by the policy in question. The Insurance Company already took the said specific plea in their Written Statement and to substantiate the same, evidence of one DW-1 was also adduced, but the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, without considering this fact and without proper appreciation of evidence on record as well as the policy conditions etc., passed the impugned judgment and award of compensation, which is bad in law and liable to be set aside and quashed.

8. The learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, came to a conclusion that the contesting opposite party has fully

established that at the time of accident, the policy did not cover the risk of the occupants, however quite erroneously held that the insurance policy was valid at the time of accident and hence, the Insurance Company is liable to pay compensation which is absolutely illegal and liable to be set aside.

9. Accordingly, the learned Senior Counsel for the appellant/Insurance Company has submitted that the Insurance Company is not at all liable to pay compensation for the occupants carried in the private car and the insurance policy do not cover the risk of the occupants travel in the private car. It is further submitted that in paragraph No. 10 of their Written Statement, the Insurance Company took the specific plea regarding the policy coverage. For ready reference, the said paragraph No. 10 of the Written Statement is extracted hereinbelow:

> "*10. That with regard to the statement made in paragraph 17 of the claim petition this opposite party state that the policy bearing No. 321201/31/2013/2127 is issued in respect of vehicle No. AS-02/A-3936 (Tata Indica DLS) in favour of opposite party No. 1 Shri Gobin Chandra Das is a PRIVATE CAR LIABILITY ONLY POLICY – ZONE B and is subject to conditions, clauses, warranties, exclusions, IMTs and IOC endorsements. And occupants in private car having liability Insurance are not covered by the policy. Hence insured is not indemnified for the vehicle is used or driven otherwise than in accordance with the schedule attached to the forming part of policy being number 321201/31/2013/2127."*

10. Further it is submitted that the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, in its judgment, has observed that there was no coverage for the occupants in the insurance policy and no extra amount was also paid to cover the risk of the occupants, however the judgment and award has been passed only with a view that the policy was valid at the time of

accident and the accident occurred due to rash and negligent driving of the driver of the offending vehicle.

11. The learned Senior Counsel further relied on the decision of Hon'ble Supreme Court reported in **(2005) 12 SCC 243 (National Insurance Co. Ltd. Vs. Bommithi Subbhayamma & Ors.)** wherein it has been held that "Statutory liability of insurer under – Held, does not cover gratuitous passengers carried in a goods vehicle – Moreover, this position has not been altered by the 1994 amendment to S. 147(1)(b), as held in Baljit Kaur, (2004) 2 SCC 1 – Hence award against Insurance Company given by High Court for death of such passenger, set aside – Motor insurance."

12. The learned Senior Counsel for the appellant further relied on another decision of this Court reported in **2019 SCC OnLine Gau 2333 (Oriental Insurance Co. Ltd. Vs. Aratichik @ Sik & Ors.)** wherein, in paragraph No. 36 thereof, it has been held as under:

> "*36. In view of the aforesaid position of law, I am of the considered view that the direction of pay and recover made in Baljit Kaur, Saju P. Paul and Manuara Khatun by the Apex Court was in exercise of its extra-ordinary jurisdiction vested in it under Article 142 of the Constitution of India and either in the peculiar facts of the case or in view of uncertainty on the point of view of law till then, as have been noted therein, to do complete justice between the parties. Since such a power is not available to a Claims Tribunal constituted under the Motor Vehicles Act, 1988, as amended, it cannot go against the law settled to the effect that in case of a gratuitous passenger carried in a goods vehicle, the insurance company is not liable to satisfy an award and the owner is the person who shall be liable to pay the compensation and as such, any direction to the insurance company to satisfy the award first and to recover the same from the owner of the vehicle is incongruous. Therefore, the decision of the Claims Tribunal to follow a direction issued by the Supreme Court in exercise of its*

extraordinary jurisdiction under Article 142 of the Constitution of India in the present case is not accordance with law. In the light of the decisions of the Supreme Court on the matter of gratuitous passenger carried in a goods vehicle and there being an excess of jurisdiction on the part of the Claims Tribunal, I am of the considered opinion that the direction of the Claims Tribunal to the insurance company to pay the compensation awarded first to the claimant and thereafter, to recover the same from the owner later on is not sustainable and therefore, is liable to be set aside. Accordingly, that part of the direction is set aside. Consequently, the owner-insurer is liable to satisfy the award and to pay the compensation to the respondent-claimant by depositing the awarded amount before the Claims Tribunal within a period of 3 (three) months from today. In the event of non-payment by the owner-insurer, it is for the Page No.# 19/19 respondent-claimant to take up appropriate proceeding before the Claims Tribunal to recover the compensation from the owner-insurer. The appellant-insurer shall be allowed to withdraw the statutory deposit made in connection with the instant appeal. To the extent above, this appeal stands allowed."

13. In this context, the learned counsel for the respondent has submitted that the learned Member, MACT, committed no error or mistake while passing the judgment and award directing the present appellant/Insurance Company to satisfy the award with a liberty to recover the same from the owner in due course by adopting lawful process. It is rightly held that at the time of incident, the vehicle was duly insured under the appellant/ Insurance Company and the accident is also occurred due to rash and negligent driving of the driver of the vehicle and hence, the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, rightly passed the order directing the present appellant/Insurance Company to satisfy the award with a liberty to recover the same. Thus, the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, committed no error or mistake to make any interference by this Court in the judgment and order dated 20.01.2015, passed in MAC Case No. 859/2013.

14. In support of his submission, the learned counsel for the respondent also relied on the following decisions:

(i) **Municipal Committee, Amritsar Vs. Hazara Singh**, reported in **1975 AIR 1083**;

(ii) **United India Insurance Company Limited Vs. K. M. Poonam & Ors.**, reported in **(2015) 15 SCC 297**;

(iii) **National Insurance Co. Ltd. Vs. Baljit Kaur & Ors.**, reported in **(2004) 2 SCC 1**.

15. In the above referred judgment reported in **(2004) 2 SCC 1**, the Hon'ble Supreme Court has held that "Policy in respect of goods vehicle – Liability of insurer, held, does not cover gratuitous passengers carried in such vehicle – Amendment of S. 147(1)(b), MV Act in 1994 does not alter this position – Expression "any person", occurring therein – Scope – Explained – As the law was not clear so long, the legal position as clarified herein directed to have prospective effect – Therefore, while allowing the insurer's appeal, in the interest of justice the insurer directed to satisfy the awarded amount and recover the same from the owner of the vehicle simply by initiating a proceeding before the executing court without filing a separate suit – Motor Vehicles Act, 1988, S. 147(1)(b) (as amended in 1994)." Paragraph No. 21 of the said judgment reads as under:

> "*21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear*

so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani (supra). We, therefore, are of the opinion that the interest of justice will be sub- served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the tribunal in such a proceeding."

16. Further, the Hon'ble Supreme Court in the above referred case reported in **(2015) 15 SCC 297** also held that "Ss. 147(1)(b), 2(35) and S. 147(1) proviso (ii) and Ss. 147(1) & (2) – Private vehicle used as a "public service vehicle" – Insurance policy and permit permitting carriage of six passengers including driver, but vehicle carrying more than six passengers – Liability of insurance company vis-à-vis owner of vehicle – Extent of, and manner of payment of compensation." In paragraph No. 36 of the said judgment, it has been observed by the Hon'ble Apex Court that liability of the insurer is confined to the number of persons covered by the insurance policy and not beyond the same and the said case, the insurance covers six occupants of the vehicle in question including the driver and accordingly, it has been held that the liability of the insurer would be confined only to six persons and the insurance company is not liable to pay compensation and it would be restricted only to number of persons insured. However, it was observed that the company can make the payment even in respect of the persons not covered by the insurance policy under the provisions

of sub-section (1) of Section 149 of the Act and accordingly, it would be entitled to recover the same if he could prove that one of the conditions of the policy do not breached by the owner of the vehicle.

17. Citing the above referred judgments, it is submitted by the learned counsel for the respondent that the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, had rightly passed the order under the doctrine of pay and recovery and considering the valid insurance policy at the relevant time of incident, the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, had rightly passed the order directing the Insurance Company to make payment of the awarded compensation.

18. After considering the submissions made by the learned counsel for both sides, I have perused the case record as well as the judgment and order dated 20.01.2015, passed by the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, in MAC Case No. 859/2013.

19. From perusal of the original record of learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, it is seen that the copy of the policy is not available in the record which was exhibited as Ext.-A by D.W.-1 while adducing evidence in support of the appellant and at the time of hearing of this present appeal, the appellant/Insurance Company was directed to produce the copy of the said policy in question and accordingly, the same was produced by the Insurance Company.

20. There is no dispute that the accident occurred due to rash and negligent

driving of the driver of the vehicle and as a result of the accident, the husband of the claimant- Lt. Lakhan Singh Phangso died as the vehicle dashed against a tree. The only ground for appeal is that the Insurance Company is not liable to satisfy the award of compensation as directed by the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati. It is the case that the vehicle, i.e. the offending vehicle bearing Registration No. AS-02A-3936, had a valid insurance policy at the relevant time of incident, however it was covered under the Private Car Act Policy and as such, the occupants carried in the private car are not covered by the policy in question.

21. On perusal of the record, further it is seen that the Insurance Company/appellant took the specific plea in their Written Statement that the Company is not at all liable to pay any compensation as the policy under which the offending vehicle was insured was under the Private Car Act Policy and to substantiate the said plea, the appellant also adduced the evidence of D.W.-1, who exhibited the insurance policy as Ext.-A and submitted that the policy does not cover the risk of the occupants. Further it is seen that in the judgment passed by the learned Member, Motor Accident Claims Tribunal No. 2, Kamrup, Guwahati, it is observed that the policy did not cover the risk of the occupants, however the Insurance Company was directed to satisfy the award of compensation with an observation that the policy was valid at the relevant time of incident and also considering the fact that the offending vehicle was duly insured under the appellant/Insurance Company.

22. The Hon'ble Apex Court in the above referred judgment reported in **(2004) 2 SCC 1** has held that policy in respect of the goods vehicle does not

cover gratuitous passengers in such vehicle and amendment of Section 147(1)(b) of MV Act does not alter this position. However, in the interest of the justice, the insurer was directed to satisfy the award and to recover the same from the owner of the vehicle by initiating the proceeding before the executing Court without filing a separate suit. But, here in the instant case, it is seen that the policy in question is not a Comprehensive/Package Policy and it is very specific from the evidence of D.W.-1 that the policy was a Private Car Act Policy. The insurer may be liable to pay compensation in a case of Comprehensive/Package Policy, but not in a case of Act Policy.

23. In this context, the judgment of Hon'ble Supreme Court reported in **(2013) 1 SCC 731 (National Insurance Company Ltd. Vs. Balakrishnan & Anr.)** can be relied on, wherein it has been held that "An "Act policy" stands on a different footing from a "comprehensive/package policy". As the Insurance Regulatory and Development Authority (IRDA), which is presently the statutory regulatory authority, has commanded the insurance companies that a "comprehensive/package policy" covers the liability of the insurer for payment of compensation to the occupant in a motor vehicle, there cannot be any dispute in that regard. The earlier pronouncements were rendered in respect of an "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. IRDA has clarified the position by issuing Circulars dated 16-11-2009 and 3-12-2009. Therefore, a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car." Paragraph Nos. 21, 22 & 26 of the said judgment reads as under:

"*21. At this stage, it is apposite to note that when the decision in Bhagyalakshmi*

(supra) was rendered, a decision of High Court of Delhi dealing with the view of the Tariff Advisory Committee in respect of "comprehensive/package policy" had not come into the field. We think it apt to refer to the same as it deals with certain factual position which can be of assistance. The High Court of Delhi in Yashpal Luthra and Anr. V. United India Insurance Co. Ltd. and Anothe, after recording the evidence of the competent authority of Tariff Advisory Committee (TAC) and Insurance Regulatory and Development Authority (IRDA), reproduced a circular dated 16.11.2009 issued by IRDA to CEOs of all the Insurance Companies restating the factual position relating to the liability of Insurance companies in respect of a pillion rider on a two-wheeler and occupants in a private car under the comprehensive/package policy.

22. The relevant portion of the circular which has been reproduced by the High Court is as follows:-

> *"INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY*
>
> *Ref: IRDA/NL/CIR/F&U/073/11/2009*
>
> *Dated: 16.11.2009*
>
> *To,*
>
> *CEOs of all general insurance companies*
>
> *Re: Liability of insurance companies in respect of occupants of a Private car and pillion rider on a two-wheeler under Standard Motor Package Policy (also called Comprehensive Policy).*
>
> *Insurers' attention is drawn to wordings of Section (II) 1 (ii) of Standard Motor Package Policy (also called Comprehensive Policy) for private car and two-wheeler under the (erstwhile) India Motor Tariff. For convenience the relevant provisions are reproduced hereunder:-*
>
> *`Section II - Liability to Third Parties*
>
> *(1) Subject to the limits of liabilities as laid down in the Schedule hereto the company will indemnify the insured in the event of an accident caused by or arising out of the use of the insured vehicle against all sums which the insured shall become legally liable to pay in respect of -*
>
> *(i) death 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 employment of such person by the insured.'*
>
> *It is further brought to the attention of insurers that the above provisions are in*

line with the following circulars earlier issued by the TAC on the subject:

(i) Circular M.V. No. l of 1978 - dated 18th March, 1978 (regarding occupants carried in Private Car) effective from 25th March, 1977.

(ii) MOT/GEN/10 dated 2nd June, 1986 (regarding pillion riders in a two-wheeler) effective from the date of the circular.

The above circulars make it clear that the insured liability in respect of occupant(s) carried in a private car and pillion rider carried on 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 No. 066/IRDA/F&U/Mar-08 dated March 26, 2008 issued under File & 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/F&U/Oct-08 dated November 6, 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 afore-mentioned circulars and any non- compliance of the same would be viewed seriously by the Authority. This is issued with the approval of competent authority.

Sd/-

(Prabodh Chander)

Executive Director"

[emphasis supplied]

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 the 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 the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the 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."

24. So, from the discussion made above, it is seen that there is no dispute that the policy in question was Private Car Act Policy which does not cover the risk of the occupants and accordingly the Insurance Company cannot be made liable to satisfy the award of compensation for death of any occupant when it is an admitted position that the policy under which the vehicle was insured was a Private Car Act Policy.

25. In view of above, I am of the considered opinion that the direction of the Claims Tribunal to the Insurance Company to pay the compensation awarded first to the claimant and thereafter, to recover the same from the owner later on is not sustainable and, therefore, is liable to be set aside. Accordingly, that part of the direction is set aside. Consequently, the owner/ insurer is liable to satisfy the award and to pay the compensation to the respondent/claimant by depositing the awarded amount before the Claims Tribunal within a period of 3 months from today. In the event of non-payment by the owner-insurer, it is for the respondent/claimant to take up appropriate proceeding before the Claims Tribunal to recover the compensation from the owner.

26. The appellant/Oriental Insurance Company Ltd. shall be at liberty to withdraw the statutory deposit, if any, made in connection with the instant appeal.

27. To the extent indicated above, this appeal stands allowed and disposed of.

28. Registry to send down the records to the learned Court below.

JUDGE

Comparing Assistant