IN THE HIGH COURT 0F JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Mac App No. 9/2021
CM No. 463/2021
CM No. 464/2021

Reserved on: 20.02.2023
Pronounced on: 13.04.2023

Ghulam Nabi Turrey ……(Petitioners)

Through: Mr. M. A. Qayoom, Advocate with,
Mr. Mian Tufail, Advocate

Versus

Farooq Ahmad Thokar and Another ……(Respondents)

Through: Mr. J. H. Reshi, Advocate for R-1
None for R-2

CORAM:HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. The present appeal has been preferred by the appellant against the judgment/award dated 27th April, 2019, passed by Motor Accidents Claims Tribunal, Shopian insofar as the appellant is concerned.

2. Before proceeding further, it would be apt to give a concise factual background of the case with a view to decide the issue in question:-

FACTS OFTHECASE:

(i) That the claim petition came to be preferred by the respondent no. 1, against the appellant and respondent no. 2, before the Presiding Officer MACT, Shopian on 14th March, 2018, stating therein that on 21.08.2015, the respondent no. 2 was driving the offending vehicle Maruti 800 bearing registration No. JK01/6321, which came from Shopian towards Kulgam at a very high speed, and when the same reached Memandar near the petrol pump, the same hit respondent no. 1 who was coming from Kulgam towards Shopian on his Motor Cycle bearing registration No. JK13B/2944, and he was injured seriously.

The specific case of the appellant is that the respondent no. 1 was immediately taken to the hospital in Shopian wherefrom he was referred to SKIMS Soura, because of his critical condition he was treated there for one month and twenty days as he had multiple fractures in his left leg and has serious injuries in his head, ribs and arms and had to undergo different surgeries, some are described in the discharge report.

(ii) The further case of the appellant is that along with the claim petition, the respondent no. 1 has filed an application for interim relief under Section 144 of the Motor Vehicles Act 1988, but it is the specific stand of the appellant that the Tribunal did not pass any orders on the said application.

(iii) The further stand of the appellant is that in the claim petition, notice is deemed to have been issued to the appellant and respondent No. 2, and from the perusal of the award it is apparent that the respondent no. 2 has appeared through his counsel and appellant was proceeded as ex-parte as according to the Tribunal, the appellant did not appear, despite service. The specific stand of the appellant in the present appeal is that the record of the Tribunal reveals that the counsel who represented respondent no. 2 sought time on 6th October, 2018, to file objections, but he did not appear thereafter before the Tribunal, and, accordingly, he too was proceeded ex-parte. It has been further pleaded by the appellant that the respondent no. 1, thereafter, produced two witnesses in support of his claim and also appeared as his own witnesses, and it was on the basis of the said witnesses, the Tribunal in terms of the impugned award dated 27th April, 2019, awarded an amount of Rs. 3,00,000/- in his favour to be paid by the appellant and respondent no. 2 along with interest at the rate of 6% Per annum, from the date of filing of the claim petition till its full realization. The Tribunal also directed that the appellant and respondent no. 2, will pay the amount within a period of thirty days from the date of serving of the award to them failing which, it was made clear that they have to pay the additional rate of 9% from the date of filing of the claim petition till its realization.

(iv) The learned counsel for the appellant further submits that since the award dated 27th April, 2019, have been passed in ex-parte and feeling aggrieved of the same, the present appeal has been preferred by the appellant on the following amongst the other grounds:-

(a) That the appellant is not the owner of alleged offending vehicle Maruti 800 bearing registration no. JKO1/6321. The vehicle actually belonged to Fareeda Bano, who sold the same to one Mohammad Ismail Bakshi S/o Abdul Khaliq Bakshi R/o Ram Nagri Shopian, Tehsil/District Shopain for a consideration of Rs. 22,000/- on 16.11.2013 and handed over the possession of the said vehicle to him along with the relevant documents on 16.11.2013 itself.

(b) That it was the respondent no. 2 who had filed an application before the Court of Mobile Magistrate, Shopian, for releasing the vehicle, in his favour as he claimed to be the registered owner of the vehicle. The court of Special Mobile Magistrate, Shopian, in terms of his order dated 10.09.2015 directed that the vehicle bearing registration no. JK01/6321 be released on Supurdnarna to the lawful owner without RC and with the condition that he shall produce the same as and when directed and shall also not dispose of the same till the final conclusion of the trial. The respondent no. 2 thereafter submitted a Supurdnama before the police, stating therein that he is the owner of vehicle Maruti 800 bearing registration no. JK01/6321, as a result of which the police released the vehicle in his favour, subject to the condition that he will produce the same before the court, as and when directed. A copy of the order dated 10.09.2015 passed by Special Mobile Magistrate, Shopian.

It is thus obvious that it was the respondent no. 2, who was not only driving the vehicle on the fateful day but it was he who was owner of the vehicle. The tribunal was not therefore justified to pass the impugned judgment/award against the appellant. The award having been passed by the tribunal against the appellant illegally and improperly, therefore, the same is liable to be set aside.

(c) That it was for the respondent no. 1 to prove, that the appellant was the owner of the vehicle Maruti 800 bearing registration no. JK01/6321 so as to succeed in his claim petition. The impugned award would however show that the respondent no. 1 had not produced any

document before the tribunal to prove that the appellant was the owner of the vehicle. The tribunal has also recorded no finding regarding the said aspect of the matter in the award. In absence of any proof regarding the ownership of the vehicle it was not open to the tribunal to pass the award against the appellant. It having however done so, the award is legally non-est and is as such liable to be set aside.

(d) That the respondent no. 1 had wrongly stated in the claim petition that the appellant was the owner of the vehicle. As has been stated herein above, the appellant was not the owner of the vehicle and the respondent no. 1 had wrongly shown him as the owner of the vehicle in the claim petition. As stated above, the vehicle belonged to one Fareeda Bano, who had sold the same to Mohammad Ismail Bakshi S/o Abdul Khaliq Bakshi R/o Ram Nagri Shopian on 16.11.2013, who in turn seems to have sold the same to respondent no. 2 and in this regard has fraudulently and fictitiously obtained an affidavit from the appellant, which affidavit has no evidentiary value or relevance. The respondent no. 1 had to array either Mohammad Ismail Bakshi, the owner of the vehicle, a party to the claim petition or else had to confine his claim against the respondent no. 2, both as owner as well as the driver of the vehicle. He having wrongly arrayed the appellant, a party to the claim petition and having obtained the impugned award at his back, therefore, the impugned award is illegal and is liable to be set aside.

(e) That without prejudice to what has been stated above, it is further submitted that in the impugned award it is stated that the respondent no. 1 has been a victim of an accident and it is roved from the police record including FIR and the final report that the cause of accident was rash and negligent driving by the driver (respondent no. 2) while plying his vehicle Maruti 800 bearing registration no. JK01/6321. It is submitted that the police had no doubt registered an FIR No. 177 of 2015 u/s 279/338 RPC and other provisions of Motor Vehicles Act but as to whether the vehicle was being driven by respondent no. 2 negligently and rashly is not established by the police report. Since negligent and rash act is a sine-quo-non for maintaining a petition u/s 166 Motor Vehicles Act, therefore also the impugned award is legally invalid and is liable to be set aside.

(f) That in terms of Section 166 of the Motor Vehicles Act, on receipt of an application for compensation made under section 166 Motor Vehicles Act, the Claims Tribunal, after giving notice of the application to the parties including the Insurer and after affording them an opportunity of being heard, had to hold an enquiry into the claim and pass an award. It is thus obvious that it is only after giving a notice of the application to the respondents and affording them an opportunity of being heard and also after holding a proper enquiry into the matter, the tribunal can pass an award, determining the amount of compensation which appears to be just, payable by the respondents. When an award is passed at the back of a party and without affording him/her an opportunity of being heard, it is legally invalid. It is very relevant to mention here that according to the tribunal, a notice was issued to the appellant but the appellant despite due service, did not appear, as such, he was proceeded ex-parte. It is however nowhere recorded in the award as to who served the notice on the appellant and when. There is also no statement of the process server recorded by the Tribunal to that effect. The process server has also not sworn an affidavit stating that he had served the notice, as is required by law.

It is respectfully submitted that the appellant had never received any notice from the tribunal nor had he failed to appear before the tribunal after he received the notice. The award dated 27.04.2019 has thus been passed in ex-parte and without any notice to the appellant and without affording him an opportunity of being heard. In that view of the matter also, the impugned award is liable to be set aside.

(g) That from the police report it is evident that the accident has taken place on 21.08.2015 when the respondent no. 2 Bike Pulsar 135 CC and the vehicle Maruti 800 collided with each other. The police after registering FIR No. 177/2015 and after conducting action had produced a challan against the respondent no. 2 before the court, which challan is still pending and reportedly till date, no witness has appeared or has been examined by the court. In absence of any finding recorded by the criminal court or by the tribunal itself that the accident had taken place due to any negligent act of the respondent no. 1 or that there was a contributory negligence on the part of the respondent no. t it had no jurisdiction to pass the award dated 27.04.2019. As stated

above the proof of rashness and negligence being a sine-quo-non for maintaining an application u/s 166 of the Motor Vehicles Act and in the instant case, no proof having been adduced by respondent no. 1 before the tribunal that the accident had taken place due to the rash and negligent act of respondent no. 2, therefore also the impugned award being based on no evidence, is liable to be set aside.

(h) That the tribunal has passed the impugned award with material illegality and irregularity and has fixed the amount of compensation in an arbitrary and capricious manner. The tribunal while passing the award has not considered the matter in its right perspective and has erroneously held that the accident was caused due to the rash and negligent driving of respondent no. 2. The Tribunal has not returned any finding as to whether the respondent no. 1 was having a license to ply the bike which met with an accident or not. It is very significant to mention here that Bike Pulsar 135 CC bearing Registration No. JK13B/2944 originally belonged to Shabir Ahmad Shah, who had sold the same to the respondent no. 1 on 20.04.2012. The award passed by the Tribunal would show that the respondent no. 1, when asked, as to whether he had a driving license or not for plying the scooter, he stated that he was a license holder but as he fell into the water, the license got destroyed. He had stated that the license was obtained by him from ARTO, Shopian. He also stated that his father was also on his scooter at that time and that he was not wearing the helmet when the accident took place. He also stated that near the occurrence site there are some shops and that the "troller" was being driven very rashly and negligently by its driver. He had also stated that he was plying his scooter on the right side but the driver of the troller had come on the wrong side. The statement made by the respondent no. 1 before the Tribunal is contradictory and irre-conceivable and inconsistent. It the respondent no. 1 had a licence which he had obtained from ARTO, Shopain for plying scooter he had to produce the same in original or a duplicate copy thereof was required to be produced by him before the tribunal. It is also relevant to mention here that the Bike Pulsar 135 CC bearing registration no. JK13B/2944 has also been released by the Special Mobile Magistrate, Shopain, in favour of respondent no. 1 on 10.09.2015. If his father was accompanying him at the time of the

accident, the tribunal had to examine him as he was the eye-witness. The respondent no. 1 has also stated that it was a "troller" which was being driven very rashly and negligently by its driver and the troller had come from the wrong side due to which the accident had taken place. The question of Maruti 800 being involved in the accident is therefore not proved by the respondent no. 1. The tribunal while passing the award has not taken the aforesaid aspects of the matter into consideration and has passed the award on surmises and conjectures. The award being thus without jurisdiction as such the same is liable to be set aside.

(i) That in terms of Section 168(2) the claims tribunal had to arrange and deliver the copies of the award to the parties concerned, expeditiously and in any case within a period of 15 days from the date of the award. The tribunal has however failed to arrange to deliver copies of the award to the appellant within a period of 15 days as stipulated in section 168(2) of the Motor Vehicles Act. The appellant has however come to know about the award dated 27.04.2019 only in the month of December, 2020, when the respondent no. 1 had filed an execution petition before the tribunal. The appellant immediately thereafter filed an application for obtaining a certified copy of the claim petition as well as of the award dated 27.04.2019 before the tribunal which was made available to him on 16.12.2020 and 21.12.2020.After obtaining the copy of the award, the appellant approached the claims tribunal for setting aside the award dated 27.04.2019 as it had been passed in ex-parte, but he was advised to file an appeal before the Hon'ble High Court against the award and his request for entertaining the application for setting aside the award, was turned down. The appellant was also made to deposit an amount of Rs. 20,000/- pending filing of the appeal before the Hon'ble High Court. The appellant is therefore filing this appeal before the Hon'ble Court for setting aside the ex-parte award dated 27.04.2019, which deserves to be allowed and the impugned award dated 27.04.20 19 deserves to be set aside.

(j) That even though the time for filing the appeal against the award commences from the date of knowledge, yet, because of COVID-19, the appellant could not file the appeal before the Hon'ble Court within the period prescribed by law. However, in view of the order of the

Hon'ble Supreme Court passed in *Suo-Motu* Writ Petition (Civil) No(s). 3/2020, this Appeal has to be treated within time. However, for abandonment and caution, the appellant has also filed an application for condonation of delay, which for the reasons stated in this appeal deserves to be allowed.

SUBMISSION OF PARTIES:-

3. The learned counsel appearing on behalf of the appellant Mr. M. A. Qayoom, has vehemently argued that the appellant is not the owner of the vehicle and rather his wife (Fareeda Banoo) is the owner of the vehicle and, accordingly, the award has been passed against the wrong person and cannot sustain the test of law and is liable to be set aside.

4. The learned counsel for the appellant has further argued that the vehicle actually belongs to Fareeda Banoo, who has sold the same to one Mohammad Ismail Bakshi S/o Ab. Khaliq Bakshi R/o Ram Nagri Shopian, for a consideration of Rs.22,000/- on 16.11.2013, and handed over the possession of the said vehicle to him along with the relevant documents on 16.11.2013 itself, and with a view to substantiate his claim the appellant has placed on record an affidavit sworn by Fareeda Banoo on 21.11.2013, showing the said position. Accordingly, the learned counsel has further argued that the impugned award dated 27th April, 2019, has been passed against the wrong person and, therefore, the same is liable to be set aside.

5. The learned counsel for the appellant has further argued that it was respondent no. 2, who has filed the application before the Court of Special Mobile Magistrate, Shopian, for release of the offending vehicle in his favour as he claimed to be the owner of the vehicle. With a view to

fortify his claim, the learned counsel for the appellant has argued that the court of Special Mobile Magistrate, Shopian, vide order dated 10th September, 2015, has directed the vehicle to be released on Supurdnama to the lawful owner without a registration certificate with the rider that the same shall be produced as and when directed and the Supurdar will not dispose of the same till the final conclusion of the trial. The learned counsel for the appellant has further argued that respondent no. 2 thereafter submitted a Supurdnama before the police stating therein that he is the owner of the vehicle Maruti 800 bearing registration No. JK01/6321, as a result of which, the police released the vehicle in his favour subject to the condition that the same will be produced as and when directed. Accordingly, the learned counsel argued that on the fateful day, respondent no. 2 was driving the vehicle and, thus, the impugned award against the appellant cannot sustain the test of law and is liable to be set aside.

6. The learned counsel appearing on behalf of the appellant has further argued that the impugned award clearly proves beyond any shadow of doubt that respondent no. 1 had not produced any document before the Trial Court to prove that it was the appellant, who was the registered owner of the vehicle, and the Tribunal has also failed to record any finding in this regard. In absence of any proof regarding the ownership of the vehicle, it was not open for the Tribunal to pass the award against the appellant and, thus, as per the learned counsel for the appellant, the award is legally *nonest* in the eyes of law and is liable to be set aside.

7. The learned counsel appearing on behalf of the appellant has

vehemently argued that the respondent no. 1 has wrongly stated in the claim petition that the appellant is the owner of the vehicle when in fact the appellant was not the owner of the vehicle. The learned counsel for the appellant has apprised this Court that the vehicle in fact belongs to one Fareeda Bano wife of the appellant, who had sold the same to Mohammad Ismail Bakshi on 16.11.2013, who in turn has sold the same to respondent no. 2, and in this regard, he has fraudulently and fictitiously, obtained an affidavit from the appellant, which affidavit has no evidentiary value or relevance as per the counsel for the appellant. Thus, it was incumbent on part of the respondent no. 1 to have arrayed Mohammad. Ismail Bakshi, as the owner of the vehicle and has to confine his claim against the respondent no. 2, both the owner as well as the driver of the vehicle, but the respondent no. 1 had wrongly arrayed the appellant as a party to the claim petition and has obtained the impugned award at his back which is illegal and cannot sustain the test of law and is liable to be set aside.

8. The learned counsel has argued that rash and negligent act is *sine-qua-non* for maintaining a petition under Section 166 of the Motor Vehicles Act 1988, but the fact whether the vehicle was being driven by respondent no. 2 rashly and negligently is not established by the police report. Although an FIR bearing No. 177 of 2015, came to be registered under Section 279/338 RPC and other provisions of the Motor Vehicles Act.

9. The learned counsel for the appellant has further argued that the finding recorded by the learned Tribunal to the extent that the order recorded by way of an interim order on the file dated 18th May, 2018,

reveals that the respondent no. 1 (appellant herein) did not appear despite service and was proceeded ex-parte is factually incorrect and contrary to record.

10. The learned counsel for the appellant has further referred to the claim petition filed by the respondent no. 1 before the Tribunal in which the appellant has been shown as a registered owner of the offending vehicle in Column 10-B which is factually incorrect and he further submits that the respondent no. 1 has failed to prove the ownership of the vehicle before the Tribunal.

11. The learned counsel has further referred to the order passed by the Special Mobile Magistrate, Shopian, dated 10th September, 2015, whereby a direction was issued to release the offending vehicle on Supurdnama without a Registration Certificate in favour of the lawful owner with a condition that he or she shall produce the same as and when directed and shall not dispose of the vehicle till the final conclusion of the trial and accordingly respondent no. 2 submitted the Supurdnama before the police stating therein that he is the owner of the vehicle and as a result of which, the police released the vehicle in his favour subject to the condition that he will produce the same before the Court as and when directed.

12. Learned counsel appearing on behalf of the appellant had further referred to the reply filed by the respondent no. 1, wherein the respondent no. 1 has admitted in the preliminary objection that it is Fareed Bano wife of the appellant, who is the registered owner of the offending vehicle which caused the accident and accordingly, the respondent no. 1 has prayed for the

dismissal of the appeal for non-joinder of the necessary party.

13. Mr. M. A. Qayoom, learned counsel for the appellant has further argued that the respondent no. 1, has admitted that Fareeda Bano is the registered owner and not the appellant and on this ground alone, the award cannot sustain the test of law as the same has been passed against a wrong person and is liable to be set aside. The admission of the respondent no. 1 vindicates the stand of the appellant. The second limb of the argument which has been advanced by the learned counsel for the appellant is that the impugned award dated 27th April, 2019, has been passed in ex-parte and the appellant has not been served.

14. The learned counsel for the appellant has referred to the finding recorded by the Tribunal in which it has been observed by the Tribunal that the "***interim order recorded on the file dated 18th May, 2018 reveals that the respondent no. 1 (appellant herein) despite due service has not appeared and as such the Court has proceeded against the appellant in ex-parte***." The learned counsel has vehemently disputed the finding recorded by the Tribunal and has argued that as per the record, he was never served. With a view to fortify his claim, the learned counsel for the appellant has placed on record copy of the notice, which for the reference is reproduced below:

> "The impugned notice has been issued by the Presiding Officer Fast Track Court Shopian, to the appellant on 14.03.2018, in which it has been stated that there is a claim petition filed against the appellant and if he wants to settle the dispute amicably with the claimant, he has to remain present

before the court on 21.04.2018.

> The impugned notice has been served through process serving agency. The report of the process serving agency reveals that the appellant has not received the notice but the notice has been served to the family members of the appellant, as the appellant was not there. The family members of the appellant were told that he has to remain present before the MACT Shopian."

15. With a view to substantiate his claim, the learned counsel has also referred and relied upon Order-5 Rules-15, 16, 17 and 18 of Civil Procedure Code to fortify his claim that he was never served and under what circumstance, the person can be deemed to have been served. Thus, from a bare perusal of the provisions of the Civil Procedure Code, the learned counsel for the appellant vehemently argued that **he was never served** in terms of the procedures as envisaged in the Civil Procedure Code, and it cannot be assumed that the appellant has been served and the award, as such, has been passed in ex-parte without providing him an opportunity of being heard cannot sustain the test of law as the service was never affected on the appellant as envisaged under the law has been followed by the Tribunal.

16. Lastly, the learned counsel for the appellant has argued that the Tribunal has failed to deliver the copies to the appellant within the period of fifteen days as stipulated in Section 168(2) of the Motor Vehicles Act and the appellant, however, came to know about the passing of the award dated 27.04.2019 only in the month of December 2020, when the respondent no. 1 had filed an execution petition before the Tribunal. The

learned counsel further submitted that he immediately filed an application thereafter for obtaining the certified copy of the claim petition as well as the award 27.04.2019, which was made available to him on 16th December, 2020. After obtaining the copy of the award, learned counsel submitted that he approached the Tribunal for setting aside the award dated 27.04.2019, which was passed ex-parte, but he was advised to file an appeal before the High Court. Consequently, the appellant was made to deposit an amount of Rs.20,000/- pending filing of the appeal before the High Court. The learned counsel further argued that the respondent no. 1 deceived the Tribunal as the respondent no. 1 never apprised the Tribunal about Fareeda Banoo being the registered owner and thus, it was incumbent on the part of respondent no. 1 to have apprised the Tribunal about the actual registered owner, when the said fact was known to respondent No. 1.

17. There is no representation on behalf of respondent no. 2, as the respondent no. 2 has been set ex-parte by virtue of an order dated 7th July, 2021. However, the reply stands filed on behalf of respondent no. 1 in pursuance to order dated 05.04.2021.

18. *Per contra* Mr. Reshi, learned counsel appearing on behalf of respondent No. 1 has taken a preliminary objection which is as under:

> It is submitted that if Fareeda Banoo is said to be the actual registered owner of the offending vehicle Maruti 800 bearing registration No. JK01/6321 that caused the accident, she ought to have been made party to the writ petition along with her and alleged transferer namely Mohammad Ismail Bakshi S/o Khaliq Bakshi R/o

Ram Nagri, Shopian.

However, it is quite surprising as to how appellant has subsequently sold the said vehicle to a third party proclaiming himself as the registered owner of the aforesaid vehicle. The Mobile Magistrate for the release of the aforesaid vehicle as the registered owner, but was released in his favour on a supurdnama without RC because it was seized from custody as a de facto owner thereof. As accident was caused by him while driving the aforesaid offending vehicle Tribunal therefore is justified to burden both de facto and de jure owner thereof jointly and severally liable to satisfy the award impugned herein.

19. Although, the learned counsel has inadvertently referred to the present appeal as a writ petition, when in fact, instead of writ petition, it could have been appeal. Besides this, the learned counsel appearing for the respondent no. 1 has submitted that the appellant had an opportunity to disclose the actual registered owner of the offending vehicle, but the appellant has deliberately chosen not to disclose the said fact before the court below with *mala-fide* intention to defeat the rightful claim of the respondent no. 1.

20. The learned counsel has further argued that if Fareeda Banoo is said to be the actual registered owner of the offending vehicle bearing registration No.JK01/6321 of Maruti 800 which caused the accident, then she ought to have been made as a party to the appeal.

21. The learned counsel for the respondent no. 1 has also referred to Annexure-1, which has been placed on record along with the objections by the learned counsel with a view to substantiate that Ghulam Nabi Turrey,

has filed an affidavit claiming to be registered owner of the aforesaid vehicle, who has sold and transferred the said vehicle for a total consideration of Rs.30,000/- besides handing over the possession to the purchaser. The learned counsel for the respondent no. 1, further submitted that this aspect of the matter has been deliberately concealed by the appellant, and respondent no. 1 has filed the same with a view to vindicate his stand.

22. The learned counsel for the respondent no. 1 further submitted that the concerned driver has not come before this Court and has not filed an appeal against the impugned award and he has accepted the award insofar as the liability of the driver is concerned. Accordingly, he has already paid Rs.40,000/- and the award stands satisfied in so far as driver is concerned.

23. The learned counsel for the respondent no. 1 has further argued that the wife can still be burdened with the liability by this Court, while hearing and deciding the appeal in spite of the fact that she was not a party before the Motor Accidents Claims Tribunal, Shopian.

24. The learned counsel for the respondent no. 1 further submits that it is the specific stand of respondent no. 1 that the Tribunal has arrived at the right and just conclusion on the basis of the aforesaid affidavit of the appellant that he is the registered owner of the vehicle and is liable to compensate the respondent no. 1 for the injuries sustained by him in the accident caused by respondent no. 2 (driver) while driving the offending vehicle rashly and negligently.

25. The learned counsel for the respondent no. 1 has further argued that the appellant was put to notice, but he deliberately chosen not to appear and as a consequence, ex-parte proceedings were initiated against him. Thus, it does not lie in the mouth of the appellant to agitate that no opportunity of being heard has been provided to him.

26. The learned counsel for the respondent no. 1, has further argued that whether the notice was actually received by the appellant or not is immaterial because after completion of a statutory period of a month, after the dispatch of summons by the Court, it is deemed service regardless of the fact whether or not the notice is actually received by the recipient or not.

27. The learned counsel for the respondent no. 1, has relied upon the judgment passed by the Supreme Court of India tiled as ***"Balwant Singh and Sons Vs. National Insurance Co. Ltd. And another"*** reported in ***2019 ACJ 3053 and the same is not applicable to the present case".***

28. Heard learned counsel for the parties at length and perused the material on record.

LEGAL ANALYSIS

29. The contention of appellant that the vehicle belonging to Fareeda Banoo, who sold the same to one Mohammad Ismail Bakshi S/o Ab. Khaliq Bakshi R/o Ram Nagri Shopian, for a consideration of Rs. 22,000/- on 16.11.2013, and handed over the possession of the said vehicle to him along with the relevant documents on 16.11.2013 itself, appears to be well-founded. The affidavit, sworn by Farida Banoo, placed on record

by the appellant corroborates the said fact which in turn proves that appellant, therefore, is not the registered owner of the vehicle. Thus, the third party liability cannot be pinned down on him by any stretch of imagination, as such, the impugned judgment/award dated 27th April, 2019, has been passed against the wrong person and, therefore, the same cannot sustain the test of law.

30. It is admitted fact by the respondents in the reply affidavit that Fareeda Bano is the registered owner, and not the appellant and on this ground also, the award cannot sustain the test of law as the same has been passed against a wrong person.

31. As per the record, the appellant was never served in terms of the procedures as envisaged in the Civil Procedure Code, the award, as such, has been passed in ex-parte without providing him an opportunity of being heard. Copy of the notice, which learned counsel for the appellant has placed on record is reproduced below:

> ***"The impugned notice has been issued by the Presiding Officer Fast Track Court Shopian, to the appellant on 14.03.2018, in which it has been stated that there is a claim petition filed against the appellant and if he wants to settle the dispute amicably with the claimant, he has to remain present before the court on 21.04.2018."***

32. The impugned notice has been served through Process Serving Agency. The report of the Process Serving Agency reveals that the appellant has not received the notice but the notice has been served to the family members of the appellant, as the appellant was not there. "The family members of the appellant were told that he has to remain present

before the MACT Shopian."

33. The appellant was, therefore, not served in terms of the procedures as envisaged in the Civil Procedure Code, the award, as such, has been passed in ex-parte without providing him an opportunity of being heard. For facility of reference, Order 5 Rule 15, 16, 17 and 18 of Civil Procedure Code is reproduced as under:

> "***15. Where service may be on an adult member of defendant's family. -Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on his at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family, whether male or female, who is residing with him.***
>
> ***16. Person served to sign acknowledgement.- Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgement of service endorsed on the original summons.***
>
> ***17. Procedure when defendant refuses to accept service, or cannot be found.- Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances***

under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service. -The serving officer shall, in all cases in which the summons has been served under Rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons."

34. The award dated 27.04.2019 has been passed in ex-parte and without any notice to the appellant and without affording him an opportunity of being heard.

35. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

36. In this context, Hon'ble Supreme Court in case titled **Mohinder Singh Gill & anr. v. Chief Election Commissioner, New Delhi & ors.,** reported as **AIR 1978 SC 851,** is quoted as under: -

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many

forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognised from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautilya's Arthasastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system."

37. In **Dharampal Satyapal Ltd. v. Deputy Commissioner of Central Excise, Gauhati and Others** reported as **(2015) 8 SCC 519** , the Hon'ble Supreme Court has highlighted that procedural fairness is essential for arriving at correct decisions, by observing:

"27. It, thus, cannot be denied that the principles of natural justice are grounded in procedural fairness which ensures taking of correct decisions and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms."

38. In case titled **State of U.P. v. Sudhir Kumar Singh and Others**, reported as **2020 SCC OnLine SC 847,** the law was crystallized as under:

"39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused

> ***to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.***
>
> ***(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.***
>
> ***(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.***
>
> ***(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."***

39. The next principle is **Audi alteram partem**, i.e. no man should be condemned unheard or that both the sides must be heard before passing any order. A man cannot incur the loss of property or liberty for an offence by a judicial proceedings until he has a fair opportunity of answering the case against him. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the

applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

40. In one of the decisions of the Hon'ble Supreme Court reported in **(1993) 1 SCC 78, C.B. Gautam v. Union of India and others**, the Hon'ble Supreme Court invoked the same principle and held that ***"even though it was not statutorily required, yet the authority was liable to give notice to the affected parties while purchasing their properties under Section 269-UD of the Income Tax Act, namely, the compulsory purchase of the property. It was observed that though the time frame within which an order for compulsory purchase has to be made is fairly tight one but urgency is not such that it would preclude a reasonable opportunity of being heard. A presumption of an attempt to evade tax may be raised In case of significant under valuation of the property but it would be rebuttable presumption, which necessarily implies that a party must have an opportunity to show cause and rebut the presumption. It was further observed that the very fact that an imputation of tax evasion arises where an order for compulsory purchase is made and such an Imputation casts a slur on the parties to the agreement to sell lead to the conclusion that before such an imputation can be made against the parties concerned they must be given on opportunity to show cause that the under valuation in the agreement for sale was not with a view to evade tax. It is, therefore, all***

the more necessary that an opportunity of hearing is provided."

41. The Hon'ble Supreme Court of India in **Urviben Chiragbhai Sheth Vs Vijaybhai Shambhubhai Joranputra & Others,** reported as **2011 AIR (SC) 2502** has held. :

> '***17. ..... It is true that while acting as a Claims Tribunal, its proceedings are summary in nature but in exercising its summary jurisdiction the Tribunal must follow principles of justice, equity and good conscience and must be aware that its summary enquiry is in connection with a legislation which is meant for social welfare….'***

42. In case titled **Ruby General Insurance Co. Ltd. vs Misri Devi**, reported as **AIR 1962 PH 522**, the Punjab and Haryana High Court has observed:

> ***'6....Thus it would be clear that the third party has to bring an action for damages against, the owner of the vehicle and in order that the insurer, namely, the Company, should be liable for the decree passed against the owner, it is necessary that a notice of the bringing of the proceedings should, be given to the Company through the Court either before or after the commencement of the proceedings in which the decree was passed and the Company shall thereupon be entitled to be made a party to those proceedings and to defend the action only on those grounds which are mentioned in that sub-section.'***

43. In terms of Section 166 of the Motor Vehicles Act, on receipt of an application for compensation made under section 166 Motor Vehicles Act, the Claims Tribunal, after giving notice of the application to the parties including the Insurer and after affording them an opportunity of being heard, was required to hold an enquiry into the claim and pass an award. It is, thus, obvious that **it is only after giving a notice of the application to the respondents and affording them an opportunity of**

being heard and also after holding a proper enquiry into the matter, the Tribunal can pass an award, determining the amount of compensation which appears to be just, payable by the respondents. The law is settled at naught that when an award is passed at the back of a party and without affording him/her an opportunity of being heard, it is legally invalid.

44. In the light of the aforesaid legal position, I have examined the facts of the present case. **The award dated 27.04.2019 has, therefore, been passed in ex-parte and without any notice to the appellant and without affording him an opportunity of being heard, thus, violating the principles of natural justice.**

45. As per the order passed by the Special Mobile Magistrate, Shopian, dated 10th September, 2015, a direction was issued to release the offending vehicle on Supurdnama without a Registration Certificate in favour of the lawful owner with a condition that he or she shall produce the same as and when directed and shall not dispose of the vehicle till the final conclusion of the trial. From plain reading of the terminology of the Supurdnama, it is clear that it was respondent no. 2, who has submitted the Supurdnama before the police stating therein that he is the owner of the vehicle and as a result of which, the police released the vehicle in his favour subject to the condition that he will produce the same before the Court as and when directed.

46. For facility of reference, the supurdnama is reproduced as under:-

Supurdnama

State through police Station Shopian vs. Muzaffar Ahmad Dar
S/o Mohammad Yousuf Dar
R/o Palpora, Shopian
Aged 27 years

Case FIR No. 177 of 2015 u/s 279/337 RPC P/S Shopian

1, Muzaffar Ahmad Dar S/O Mohammad Yusuf Dar, am a resident of Halawpora, Shopian state that I have received from Police Shopian Maruti 800 bearing registration No. JK01-6321, Engine No. 429299 Chasis No. 310159 Model 1989 along with papers seized vide seizure memo except R/C as per orders of the Court of Additional Mobile Magistrate, Shopian, in presence of the witnesses shown at the margin.

I undertake to produce the said Maruti Vehicle before the court during the pendency of the case and will not sell the said vehicle or change its nature till then.

Dated 09.09.2015
Superdar
Sd/-

Witness
Sd/-

Muzaffar Ahmad Dar

Nazir Ahmad Palla
S/O Ghulam Mohi-ud-din
R/O Halowpora, Shopain
98

Witness
Sd/-
Abdul Majid Lone
S/O Ghulam Mohammad Lone
R/O Khasipora Shopian

47. From bare perusal of the award, the finding has been recorded that a notice was although issued to the appellant but the appellant despite service did not appear and this was precisely the reason that the appellant was proceeded ex-parte. The aforesaid finding of the Tribunal is without any basis as there is no whisper in the award with regard to factum of service of the notice on the appellant nor there is any mention of the date when the said notice was served to the appellant. There is no mention in the award with regard to recording of the statement of the Process Server by the Tribunal nor had the Process Server sworn an affidavit stating therein

whether he had ever served the notice as required under law. The stand taken by the appellant that he had never received any notice from the Tribunal cannot be faulted. Thus, **I hold that the award dated 27th April 2019 has been passed in ex-parte and without any service of notice to the appellant by providing him an opportunity of being heard. On this ground alone, the award is liable to be set aside.**

48. From the record, it is manifestly clear that it was respondent No. 2, who had filed an application before the Court of Mobile Magistrate Shopian for the release of vehicle in his favour, who claimed to be the register owner of the vehicle. Accordingly, the said Court vide order dated 10th of September 2015 directed the vehicle bearing registration No. JK01-6321 to be released on supurdnama to the lawful owner without registration certificate and with the condition that he shall produce the same as and when directed and with a further rider that he shall not dispose of the same till the final conclusion of the trial. On the aforesaid condition, the police released the vehicle in his favour. Thus, it can safely be concluded that responder No. 2 was not only driving the vehicle on the fateful day but he was the registered owner of the vehicle. **Accordingly**, **the Tribunal was not justified to pass the impugned award against the appellant**.

49. It was incumbent on the part of respondent No. 1 to have proved that the appellant was the owner of the vehicle in order to succeed in the claim petition. The impugned award shows that respondent No. 1 had not produced any document before the Tribunal to prove that that the appellant was the owner of the vehicle as there is no finding recorded in this aspect

in absence of any such finding with regard to the ownership of the vehicle, the award cannot sustain the test of law.

50. It is settled that proof of rashness and negligence on the part of the driver is *sine qua non* for maintaining application under section 166 of Motor Vehicles Act. The police had no doubt registered an FIR bearing No. 177/2015 under section 279/338 RPC and other provisions of Motor Vehicles Act but whether the vehicle was being driven by respondent No. 2 negligently and rashly has nowhere been established by the police report. In absence of the same, the impugned award is legally invalid and liable to be set aside in-so-far as the appellant is concerned.

51. I am fortified by the observations of Hon'ble Supreme Court in case titled **Oriental Insurance Co. Ltd. Vs. Premlata Shukla** reported as **2007 AIR SCW 3591, wherein it has been held that: -**

> *"Where an accident occurs owing to* ***rash and negligent*** *driving by the driver of the vehicle, resulting in sufferance of injury or death by and third party, the driver would be liable to pay compensation therefor."*

52. The contention of Mr. Reshi, learned Government Advocate on behalf respondent No. 1 is that there is not a whisper by the appellant that his wife is registered owner and a duty was cast on the appellant to have filed an application on behalf of wife before the Tribunal in this regard.

53. Mr. Qayoom, learned counsel for the appellant strongly refuted the claim of respondent No. 1 and submits that the appellant was never served and how could he apprise the Court about the factum of his wife

being the registered owner of the vehicle.

54. In terms of Section 168(2), the claims tribunal had to arrange and deliver the copies of the award to the parties concerned, expeditiously and in any case within a period of 15 days from the date of the award. The tribunal has however failed to arrange to deliver copies of the award to the appellant within a period of 15 days as stipulated in section 168(2) of the Motor Vehicles Act. As per the stand of the appellant, he has come to know about the award dated 27.04.2019 only in the month of December, 2020, when the respondent no. 1 had filed an execution petition before the tribunal. The appellant filed an application thereafter for obtaining a certified copy of the claim petition as well as of the award dated 27.04.2019 before the tribunal which was made available to him on 16.12.2020. As per the appellant, after obtaining the copy of the award, the appellant approached the claims tribunal for setting aside the award dated 27.04.2019 as it had been passed in ex parte and as per the stand of the appellant, he was advised to file an appeal before the Hon‘ble High Court against the award and his request for entertaining the application for setting aside the award, was turned down. This aspect of the matter has not been specifically denied by respondent No. 1.

CONCLUSION

55. In light of the aforesaid settled legal position coupled with the submissions made by the learned counsel for the parties and the material on record, the appeal filed by the appellant is allowed and the impugned judgment/award dated 27th April 2019 passed by the Motor Accident

Claims Tribunal, Shopian, insofar as it fastens the liability on the appellant to pay compensation is set aside. Accordingly, the matter is remanded back to the Tribunal for rehearing and deciding the same in accordance with law with in a period of three months from the date of receipt of copy of this judgment after putting the parties to notice.

56. Registrar Judicial of this Court is directed to transmit the record, if any, to the Tribunal forthwith and also to remit the amount deposited by the appellant while filing the present appeal, before the Registry.

57. **Disposed of** in the aforesaid terms.

(WASIM SADIQ NARGAL)
Judge

Jammu:
13.04.2023
Ram Murti

Whether the order is speaking: Yes
Whether the order is reportable: Yes