

(2014) 05 GAU CK 0023

Gauhati High Court (Kohima Bench)

Case No: M.A.C. Appeal No. 49 (K) of 2007

New India Assurance
Co. Ltd.

APPELLANT

Vs

S.K. Roy Choudhury

RESPONDENT

Date of Decision: May 16, 2014

Acts Referred:

- Motor Vehicles Act, 1988 - Section 140, 170

Citation: (2015) 1 GLD 180 : (2014) 3 GLT 372

Hon'ble Judges: Nishitendu Chaudhury, J

Bench: Single Bench

Advocate: Wabang Longkumer, Advocate for the Appellant; B. Debnath, M. Wapang and N. Mich, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.

Pursuant to a note placed by the Registry on 10.05.2013, it was brought to the notice of this Court that MAC Appeal No. 49(K)/2007 was heard and judgment reserved on 22.03.2010 but thereafter neither the judgment was passed nor were the records traceable from this Court. Under such circumstances, the learned counsel for the parties reconstructed a file in the form of paper book in 2 (two) volumes and submitted it to the Court. Having heard the learned counsel for the appellant, the claimant and the owner of the vehicle, this Court by order dated 13.05.2013 fixed the case for hearing on the basis of the aforesaid records furnished from the side of the counsel for the parties. Accordingly, the matter has been taken up today. In this appeal, the appellant insurance company has challenged the judgment and award dated 30.08.2007 passed by the learned Member, M.A.C.T., Dimapur, in MAC case No. 85/2006 and thereby awarding a total compensation of Rs. 32,16,462/- (Rupees thirty two lakh sixteen thousand four hundred and sixty two) including no fault award along with interest at the rate of 9% per annum from the date of filing claim. The claimant was an Executive Engineer in the P.W.D., Govt. of

Nagaland at the relevant time. The respondent No. 2 being a first class contractor under the Government of Nagaland requisitioned service of the claimant (respondent No. 1 herein) for technical and expert advice in course of interaction with N.E.C. officials. While on movement from Shillong to Kohima, in such service by the vehicle of the respondent No. 2 which is a Maruti Van being No. NL-01C-1893, the claimant met with an accident on 20.05.2005 at about 3.40 pm at Lalmati area on NH-39 in the district of Kohima. The driver died on the spot and the claimant sustained grievous multiple injuries on head and chest including bone fracture on his left femur, both bones of left leg, left pelvis, left numerous, left medial epiceondyle, left base of the metacarpal in addition to brain injury. The claimant was treated initially at Bethel Medical Center, Kohima immediately after the accident from 20.05.2005 to 14.06.2005 and thereafter he was taken to Calcutta Medical Research Institute, Kolkata on 14.06.2005 at 6.55 pm. He was treated there from 14.06.2005 to 12.07.2005 during which period he had under gone treatment under the experts of Orthopedic surgery, Urology, Physiotherapy etc. under various doctors and hospitals including Wockhardt Hospital and Kidney Institute, Wockhardt Medical Center, Kolkata etc. The claimant thereafter approached the MAC Tribunal, Dimapur vide MAC Case No. 85/2006 and claimed total compensation of Rs. 45,91,6501/- (Rupees forty five lakh ninety one thousand six hundred and fifty) vide paragraph 21 of the claim petition. The claimant also prayed for interim award of Rs. 25,000/- under Section 140 of the Motor Vehicles Act, 1988. The police report, certificate issued by the owner, certificate of registration of the vehicle, driving license of the deceased driver, insurance policy No. 530501131/05/00187 under New India Assurance Co. Ltd. and some offer letters from various construction companies offering post-retirement engagement of the claimant, were also furnished along with the claim petition.

2. The owner of the vehicle was opposite party No. 1 in the MAC Case No. 85/2006. By filing written statement he admitted the factum of accident but by paragraph 7 thereof he disclosed that the vehicle was duly insured under the New India Assurance Co. Ltd. The opposite party No. 1, claiming consequently that liability of the insurance company (opposite party No. 2) being there, the claim case be dismissed against the owner/opposite party No. 1.

3. The opposite party No. 2 (insurance company) also submitted written statement. In paragraph 5 of the written statement it claimed that the insured/claimant was a passenger travelling in Maruti Van bearing No. NL-01C-1893 but the insurance policy issued to the opposite party No. 1 in respect of that vehicle did not cover risk of passenger and opposite party No. 2 did not receive any premium for covering the risk of passengers travelling in the vehicle. The opposite party No. 2, therefore, denied its liability. By paragraph 15 of the written statement it reserved its right to contest and defend the case on merit under Section 170 of the Motor Vehicles Act, 1988, if necessary.

4. Upon aforesaid rival contentions of all the 3 (three) parties to the proceeding, the learned Tribunal framed as many, as 6 (six) issues and the same are quoted below:

i) Whether the vehicle No. NL-01C-1893 met with an accident on 20.05.2005 at Lalmati on NH- 39 due to rash and negligent driving of its driver?

ii) Whether the claimant was travelling by the offending vehicle No. NL-01C-1893 on 20.05.2005 for owner's works and interest or as a passenger and sustained grievous injuries rendering permanently disabled due to the accident and the driver died on the spot?

iii) Whether the claimant is a qualified Civil Chartered Engineer (India), if so what was his monthly income and future prospect in life?

iv) Whether the vehicle No. NL-01C-1893 involved in the accident was driven by an authorized driver and was in possession of requisite documents at the relevant period of accident?

v) Whether the vehicle No. NL-01C-1893 was with the New India Assurance Company Limited during the relevant period of accident, if so whether the accident and its consequences are covered by the Insurance Policy?

vi) Whether the claimant is entitled to compensation, if so to what extent and payable by whom?

5. The claimant examined himself as PW 1 and Dr. S. Debnath as PW 2 and exhibited 39 documents. The opposite party No. 1, owner of the company, examined its Manager, Kartick Maji as sole witness who proved 3 (three) documents, namely, the certificate of insurance as Ext. D1, certificate of registration as Ext. D2 and the driving license of the driver as Ext. D3. The sole witness, examined by the opposite party No. 2 (insurance company), was the DW 2 in the case who was an administrative officer of the insurance company. He did not exhibit any document but in course of his examination-in-chief he stated orally that the company is not liable because the insured vehicle was meant for the use of owner alone and not for hiring and carrying passenger. According to him claimant was a gratuitous passenger of a private car and no extra premium was paid to cover risk of the passenger. In course of cross examination he admitted that the insured vehicle met with accident on 20.05.2005 and that the same was meant for use by the owner for his works and benefit and that he had no evidence at his disposal to prove that the claimant was travelling as fare paying passenger in the insured vehicle which met with accident.

6. The learned Tribunal after perusal of the evidence adduced by the parties passed its judgment on 30.08.2007 and awarded an amount of Rs. 31,91,462/- (Rupees thirty one lakh ninety one thousand four hundred and sixty two) along with interest at the rate of 9% per annum from the date of claim i.e. 28.08.2006. The direction was given for making payment within 30 days of the order. It is this award which has been brought under challenge in this appeal by the insurance company.

7. I have heard Mr. Wabang Longkumer, learned counsel for the appellant, Mr. B Debnath for the respondent No. 1 (claimant) and Mr. N Mich for respondent No. 2 (owner of the vehicle).
8. Mr. Longkumer, learned counsel for the appellant, would argue that the insurance policy did not cover risk against third party passenger and in that view of the matter the learned Tribunal ought to have dismissed the claim against the present appellant. On merit he stated that the learned Tribunal committed error in assessing loss of income of the claimant. The claimant met with an accident on 20.05.2005 and only 7 months thereafter he retired on superannuation on 31.12.2005 and thus, there was no question of calculating his loss of income for 8 long years and too at the rate of Rs. 25,000/- (Rs. Twenty five thousand) per month presuming that the claimant would have been appointed by private employers after his retirement, had he not been disabled by the accident in question.
9. Per contra, Mr. B Debnath, learned counsel for the claimant, would argue that the appellant not having led any evidence to prove that the claimant was a hirer passenger of the vehicle in question, there is no scope to make such argument merely on an oral evidence of the sole witness. He stated that even DW 1 admitted the claimant to be in requisitioned service of the owner opposite party No. 1 and since the insurance policy is a package policy, occupant of the vehicle is covered by such insurance. The objection of the appellant, therefore, as to applicability of insurance coverage, is non-existent. Coming to the quantum of compensation, the learned counsel for the respondent No. 1 (claimant) heavily relied on exhibits 37, 38 and 39 to show that even prior to his retirement from the service he had been offered employment by at least 3 (three) private firms in view of his long experience and knowledge in the field of engineering. The offer letters having been exhibited as Ext. 37, Ext. 38 and Ext. 39 the appellant did not lead any rebuttal evidence to negate the evidence placed by the claimant and there was no specific cross examination on the point of validity or otherwise of these offer letters. Mr. B Debnath placed reliance on the judgment of the Hon"ble Supreme Court in the case of [National Insurance Company Ltd. Vs. Balakrishnan and Another](#), to argue that in a package policy the occupants of a private car are covered and so insurance company cannot avoid the liability. Mr. N. Mich, learned counsel for the respondent No. 2 (owner) argued in the same breadth that the policy was a package policy and so passenger was definitely covered by the said policy. He relied on the requisition letter and the certificate issued by the owner which is Ext. P-11 and stated that the claimant was not a hirer of the vehicle. He was in employment under the owner on requisition.
10. I have perused exhibits available in the paper books. Exhibit P-11 is a certificate issued by the owner of the vehicle to show that the claimant was on requisition by the owner at the relevant time for rendering technical and expert advice in course of interaction with N.E.C. officials. This certificate also shows that the vehicle carrying the claimant met with accident on 20.05.2005 while returning from the duty at

Lalmati area resulting in death of the driver, Nipen Gogoi and grievous multiple injuries to the claimant. Exhibits 1 to 24 are the documents to show that the claimant received treatment at Bethel Medical Center till 14.06.2005 and he had to pay Rs. 84,440/- (Rupees eighty four thousand four hundred and forty) at the time of discharge against cash receipt Ext. P-15. The bill dated 14.06.2005 for Rs. 84,440/- (Rupees eighty four thousand four hundred and forty) was exhibited as Ext. P-6. Cash memos for treatment, exhibited as Ext. P-17 (series), show an expenditure of Rs. 81,047/- (Rupees eighty one thousand and forty seven). Exhibit P-18 is the discharge certificate dated 12.07.2005 from Calcutta Medical Research Institute and the concerned bill dated 12.07.2005 for Rs. 2,39,739/- (Rupees two lakh thirty nine thousand seven hundred and thirty nine) is the Ext. P-19. Pharmacy bill of Rs. 34,629.31/- (Rupees thirty four thousand six hundred twenty nine and thirty one paise) is Ext. P-20 issued by Calcutta Medical Research Institute and the final bill of Rs. 44,750/- (Rupees forty four thousand seven hundred and fifty) is Ext. P-21. Another pharmacy bill dated 01.09.2005 is exhibited as Ext. P-22 issued by Calcutta Medical Research Institute for Rs. 10,797.43/- (Rupees ten thousand seven hundred ninety seven and forty three paise). Similarly, charge slip for Rs. 2,880/- (Rupees two thousand eight hundred and eighty) issued by Calcutta Medical Research Institute is the Ext. P-23. The cash memos of Wockhardt Medical Center for Rs. 13,843.85/- (Rupees thirteen thousand eight hundred forty three and eighty five paise) is exhibited as P-24 whereas money receipt of Rs. 58,800/- (Rupees fifty eight thousand eight hundred) by Dr. Noni Gopal Pal is exhibited as Ext. P-25. Private nurse's charges of Rs. 19,500/- (Rupees nineteen thousand five hundred) vide money receipt is exhibited as Ext. P-26 and that of Rs. 22,500/- (Rupees twenty two thousand and five hundred) as Ext. P-27. Exhibits P-28, P-29, P-30, P-31, P-32, P-33 and Ext. P-34 similarly bear testimony to expenditure of Rs. 3,304.05, Rs. 623.40/-, Rs. 1,772/-, Rs. 2200/-, Rs. 1583.50/-, Rs. 6,822.05/-, Rs. 57,230.311 - respectively. Once all these expenditures are added together it comes to Rs. 6,86,461.90/- (Rupees six lakh eighty six thousand four hundred sixty one and ninety paise). The finding of the learned Tribunal in regard to these items, therefore, cannot be held to be perverse. By Ext. P-37 Frontier Construction Company of Nagaland offered on 06.03.2005, post retirement employment to the claimant on a consolidated monthly salary of Rs. 25,000/- (Rupees twenty five thousand). Similarly, by Ext. P-38 Prakash & Co. of Nagaland offered post retirement engagement to the claimant at monthly remuneration of Rs. 28,000/- (Rupees twenty eight thousand). Ext. P-39 is the employment offer by Singh Construction Co. issued on 31.03.2005 to the claimant at monthly payment of Rs. 30,000/- (Rupees thirty thousand). All these offers were made prior to the accident which had taken place on 20.05.2005. As on that date, the claimant had only 7 more months of service and so he was receiving offers of post retirement engagement by the construction companies in recognition of his experience and expertise. By producing certificates, the claimant has asserted that he is a Chartered Engineer apart from a graduate in Civil Engineering from Regional Engineering College, Srinagar. He is also a qualified valuer and a member of Indian

Council of Arbitration. With all these documents, the claimant wanted to establish that the offer of post retiral engagements were on the basis of his knowledge, experience and expertise in the field of civil engineering. Surprisingly, neither in course of cross examination of the PW1 (claimant) nor by adducing independent evidence the opposite parties in the claim case could discredit his claim. No question was put to him as to authenticity or veracity of the Ext. P-37, P-38 and P-39. Rather in course of cross examination he was asked as to whether he had accepted any of the engagement offers made to him. The offer was made prior to the incident had taken place rendering the claimant disabled and unfit for post retiral engagement so naturally his reply was that there was no question of accepting the offers as the engagements were supposed to have been made only after his retirement on 31.12.2005 and the unfortunate accident had taken place prior to his superannuation.

11. In the case of Balakrishnan (supra), the Hon"ble Supreme Court considered the law regarding insurance coverage of a passenger in a private vehicle and held that a pillion rider in a two wheeler and an .occupant in private car are covered by package policy. The position, however, would be different if the insurance policy is an Act Policy. The insurance policy was exhibited in this case and the same is available in the paper book. It is clearly written at the top right hand corner of the policy that it is a package policy. Insurance policy is Ext. D1 and registration certificate is Ext. D2. Since Ext. D1 shows that it is a package policy in the light of the law laid down in the case of Balakrishnan (supra), the claimant being an occupant of the insured vehicle is covered by the insurance policy.

12. PW 2 Dr. S. Debnath described the multiple grievous injuries and fractures sustained by the claimant on his femur bone, fracture of tibia, fracture of Pubic bone, fracture of left numerous, fracture of lateral Epiceondyle of left numerous, injury on perineum apart from lacerated injuries all over his body including penis and testes. It was also proved that he had to undergo orthopedic, neurological and urological treatment and management followed by physiotherapy but yet he was unable to walk without crutch and that he had been rendered permanently disabled and unfit for any job. The PW2 has further opined that the claimant would require future treatment. Virtually there was no serious cross examination of this witness to show that his statements are incorrect. Merely some suggestions were made in mechanical manner without having any serious impact on his credibility. The learned Tribunal has considered all these evidences. The learned Tribunal has also considered the law holding the field and has discussed the judgments passed by the Hon"ble Supreme Court from time to time. The learned Tribunal after consideration of the evidences as aforesaid decided all the issues in favour of the claimant. The learned Tribunal believed in exhibits P-37, P-38 and P-39 in regard to post retiral offer of the engagement to the claimant and accepting the lowest offer of Rs. 25,000/- (Rupees twenty five thousand) per month as the future prospect of his income made the calculation. The claimant was 57 years of age at the time of

accident. Applying the table of multipliers suggested in [Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another,](#) , appropriate multiplier for age group 56 to 60 years is 8. The learned Tribunal, therefore, chose the correct multiplier. Accordingly, there is no error in computation of income. The appeal is, thus, without merit and it is dismissed.

It is stated that the appellant has already deposited Rs. 16,00,000/- with the Registry of this Court out of which 40% of the deposited sum was permitted to be withdrawn by the claimant which he accordingly withdrew. The balance 60% of Rs. 16,00,000/- i.e. Rs. 9,60,000/- is lying with the Registry. The appellant shall deposit the balance sum of Rs. 15,91,462/- within a period of 3 (three) months from today. On such deposit being made, the claimant shall be entitled to withdraw whole of the amount lying with the Registry of this Court.

No order as to costs.