

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 20-11-2012

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

MAC App. No.04 of 2012

The Branch Manager,
New India Assurance Company Limited,
M. G. Marg, Gangtok,
East Sikkim. **... Appellant**

Versus

1. Smt. Narmati Subba,
W/o Late Birkha Bahadur Subba
 - (i) Kritika Subba,
D/o Late Birkha Bahadur Subba
 - (ii) Hangeen Subba,
S/o Late Birkha Bahadur Subba
 - (iii) Roshani Subba,
D/o Late Birkha Bahadur Subba
 - (iv) Yangseema Subba,
D/o Late Birkha Bahadur Subba

Respondents No.(i) to (iv) being minor
are represented by Respondent No.1,
their mother and natural Guardian.

All resident of Sakyong,
Bhaluthang,
P.O. Sakyong,
P.S. Gyalshing,
West Sikkim.

**... Respondents/
Claimants**

2. Shri Namgyal Tshering Bhutia,
S/o Late Goma Lama,
R/o Sang Royong
East Sikkim
(Seller of vehicle No.SK-02/0486
Maruti 800 Car) **... Respondent**

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For Appellant : Mr. A. K. Upadhyaya, Senior Advocate with Ms. Binita Chhetri and Ms. Dawa Jangmu Sherpa, Advocates.

For Respondent No.1 : Mr. N. Rai, Senior Advocate with Ms. Jyoti Kharka, Mr. K. B. Chettri and Mr. Jeewan Kharka, Advocates.

For Respondent No.2 : Dr. (Ms) Doma T. Bhutia, Advocate.

J U D G M E N T (O R A L)

Wangdi, J.

This Appeal is directed against the impugned judgment dated 21-02-2012 passed by the Motor Accident Claims Tribunal, South & West Sikkim at Namchi in M.A.C.T. Case No.19 of 2010 by which the Respondents No. 1 and (i) to (iv), have been awarded death compensation of ₹ 23,75,876/- to be paid by the Appellant with interest @ 10% per annum from the date of filing the Claim Petition, i.e., 06-10-2010, until full and final payment after deducting the interim payment of ₹ 50,000/- made in pursuance of the Order dated 14-07-2010.

2. The brief facts of the case relevant for the purpose of disposal of this Appeal are that, on 26-01-2010 the deceased along with his family members while returning from Chungbung to their home at Sakong, West Sikkim, in a Maruti 800 Car bearing registration No.SK-

02/0486 met with an accident and the deceased who was seriously injured later succumbed to his injuries and died on the way to Siliguri where he had been referred for treatment. The vehicle having been duly insured with the Appellant-Insurance Company, the Respondents No.1 and (i) to (iv) who are the dependants of the deceased, preferred a claim for death compensation before the Motor Accident Claims Tribunal, South & West Sikkim at Namchi resulting in it passing the impugned judgment.

3. In the Appeal filed before this Court, there are substantially three grounds raised in assailing the impugned judgment. They are:-

- (i) That the deceased at the time of the death was the owner of the accident vehicle and, therefore, not covered as a third party under the policy of insurance;
- (ii) That the deceased was holding only a Learner's Licence and was not a person holding a effective driving licence and, therefore, has clearly violated the provisions of Clause (b) of Rule 3 of the Central Motor Vehicles Rules, 1989; and
- (iii) That certain portions of the award cannot be sustained being beyond the scope of the Second Schedule to the Motor Vehicles Act, 1988. These as per the Appellant pertain

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to the award of compensation against Loss of Love and Affection for ₹ 30,000/-, Future Prospect for ₹ 2,00,000/- and Pain and Suffering for ₹ 5,000/-.

4. During the course of hearing, Mr. A. K. Upadhyaya, Learned Senior Advocate, appearing for the Appellant, fairly conceded that the first objection would not sustain any longer in view of the decision in ***Pushpa alias Leela and Others vs. Shakuntala and Others : AIR 2011 SC 682*** and, therefore, preferred not to press it. On the second ground, it has been submitted that it was incumbent upon the claimant to have pleaded the fact of the deceased not having violated any of the Rules under the Motor Vehicles Act, more particularly, Clause (b) of Rule 3 of the Central Motor Vehicles Rules, 1989. Mr. Upadhyaya by referring to the policy cover filed as Annexure P7 (collectively), submitted that compliance of Rule 3 is a necessary condition in the policy of insurance. It is his further submission that in the objection to the Claim Petition filed on behalf of the Appellant this fact had been specifically pleaded in paragraphs 4, 12 and 14 thereof. Relying upon the case of ***Sardari and Others vs. Sushil Kumar and Others : (2008) 17 SCC 208*** Mr. Upadhyaya submitted that in view of the apparent breach of the terms of the insurance policy, the Claim Petition

ought to have been rejected. For these reasons, Mr. Upadhyaya submits that the award would not be sustainable and, therefore, deserved to be set aside and, even if allowed it required to be modified in view of the third ground as set out above.

5. Mr. N. Rai, Learned Senior Advocate, for the Respondents No.1 and (i) to (iv), submits that apart from his serious objection as regards the delay in filing the Appeal the grounds raised on behalf of the Appellant would not be sustainable. On the question of second ground, i.e., the violation of Rule 3(b) of the Central Motor Vehicles Rules, 1989, it is his submission that the insurance policy clearly prescribes that a person holding a Learner's Licence may also drive the vehicle subject to Rule 3 of the Central Motor Vehicle Rules, 1989. In the present case, as per Mr. Rai, the ground had not been specifically raised in the written objection filed on behalf of the Appellant before the Claims Tribunal and no issue, therefore, had been struck and, therefore, this ground would not be available to the Appellant. In so far as the modification of the award as pointed out by Mr. Upadhyaya is concerned, Mr. Rai submits that they would have no objection if the award is modified accordingly.

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6. Before embarking upon the merits of the Appeal, the parties were heard on the application of condonation of delay filed on behalf of the Appellant in preferring the Appeal. Having regard to the facts and circumstances set out on behalf of the Appellant in the application for condonation of delay and in consideration of the submissions placed by Mr. Upadhyaya, the delay in filing the Appeal is condoned.

7(a). On the merits of the Appeal, upon consideration of the rival submissions made on behalf of the Learned Counsels, the materials on record including the pleadings of the respective parties and the evidence, I find that the only substantive ground raised on behalf of the Appellant that the deceased had violated the provisions of Rule 3(b) of the Central Motor Vehicles Rules, 1989, appear to be unsustainable .

(b) In the first instance as has been rightly pointed out by Mr. Rai, the written objections filed on behalf of the Appellant to the Claim Petition before the Learned Claims Tribunal is totally devoid of specific pleadings as regards the violation. Paragraphs 4, 12, and 14 of the written objection referred to by Mr. Upadhyaya are of general

nature which would be apparent on a perusal of those reproduced below for convenience:-

"4. That, the ill-fated vehicle was being driven and used in contravention of the insurance policy the claimant is thus not entitled to any compensation thereof from the opposite party No.2.

.....

12. That, reference paragraphs 25 of the claim petition it is submitted that the amount of compensation claimed by the claimants is excessive and not according to the law and it is further submitted that the claimants are not entitled to the compensation claimed by them and that the suit is liable to be dismissed with cost.

.....

14. That, the opposite party No.2 begs to submit that the vehicle in question was a private vehicle and not a public service vehicle, it was being driven by the deceased without any authorization therefore the vehicle at the relevant time was being driven in contravention to the terms and conditions of the Insurance Policy, therefore the O.P No.2 is not liable to pay the compensation as claimed."

(c) If it is the case of the Appellant that the Claimants were rendered ineligible for the compensation for any violation of the provisions of the Act or the Rules, law necessitates specific pleadings to that effect, and in my view, it is more so in a case of the present kind which arises out of a benevolent legislation. Apart from paragraphs 4, 12 and 14 which on a plain reading are vague and nebulous, the written objection is bereft of any pleading that the provision of Rule 3(b) of Central Motor Vehicles Rules, 1989, had been violated. No specific issue

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had been struck as revealed from the records from which also it can be reasonably presumed that the Appellant did not raise any objection on this aspect. This presumption is fortified by the fact that the Appellant did not adduce any evidence on this and that the point was not at all pressed before the Learned Claims Tribunal, a position which is fairly conceded by Mr. Upadhyaya. Under these circumstances, the objection does not appear to be sound and is accordingly rejected.

(d) I have considered the case of **Sardari (supra)** cited by Mr. Upadhyaya. Paragraph 10 was emphasized by him more particularly the following:-

"10. Although, in terms of a contract of insurance, which is in the realm of private law domain having regard to the object for which Sections 147 and 149 of the Act had been enacted, the social justice doctrine as envisaged in the Preamble of the Constitution of India has been given due importance. The Act, however, itself provides for the cases where the insurance company can avoid its liability. Avoidance of such liability would largely depend upon violation of the conditions of contract of insurance.
....."

Obviously, the above is a reinstatement of the well-settled position of law and this Court is bound by it. However, in that very paragraph it has also been held as under:-

"..... Where the breach of conditions of contract is ex facie apparent from the records, the court will not fasten the liability on the insurance company. In certain situations,

however, the court while fastening the liability on the owner of the vehicle may direct the insurance company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner." [underlining mine]

In the present case, the breach of the conditions of contract as alleged is conspicuous by its absence in the pleadings far from it being ex facie apparent from the records. The decision is, therefore, clearly distinguishable from the facts and circumstances as obtaining in **Sardari (supra)**.

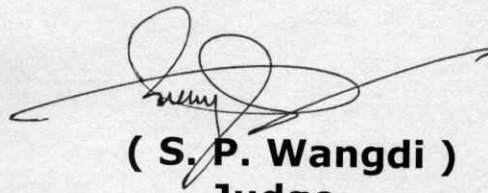
(e) In so far as the third ground is concerned there appears to be substance in the submission of Mr. Upadhyaya which position is fairly conceded by Mr. N. Rai and, therefore, no further deliberations would be necessary on this aspect.

8. In the above premises, the Appeal is partially allowed and the award stands modified as under:-

1. Loss of Earning	₹ 21,31,376.00
2. Funeral Expenses	₹ 2,000.00
3. Loss of Estate	₹ 2,500.00
4. Loss of Consortium	₹ <u>5,000.00</u>
Total	₹ <u>21,40,876.00</u>

The award of interest in the impugned judgment shall stand unaltered.

- 9.** It is directed that the awarded amount shall be deposited in a Nationalised Bank in Fixed Deposits in the names of the claimants-Respondents No.1 and (i) to (iv), in the following manner:-
- (i) The claimants-Respondents No.1 and (i) to (iv) - ₹ 4,00,000/- each. The Fixed Deposits in respect of minor Respondents No.(i) to (iv) shall continue and renewed from time to time until they attain the age of majority.
 - (ii) The balance amount including the interest accrued in terms of the impugned judgment shall be deposited in the name of the Respondent No.1 for the purpose of meeting the expenditure in running the family.
- 10.** The Appellant-Insurance Company shall inform this Court of the compliance of this judgment within a period of 15 days from hence.
- 11.** Let a copy of this judgment and the original records of the case be remitted forthwith to the Learned Claims Tribunal, South and West Sikkim at Namchi for its compliance.


(S. P. Wangdi)
Judge
20-11-2012

Approved for reporting : Yes/No

Internet : Yes/No

