IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

MA No. 41/2008 c/w
MA No.70/2008

Reserved on: 04.05.2023
Pronounced on: 11.05.2023

Seema Phull and another
Naina Sodi and others

...appellants

Through: - Mr.Anuj Dewan Raina Advocate
Mr. Ankesh Chandel Advocate

Vs.

United India Insurance Company and another

…respondents

Through: -Mr. D.S.Chouhan Advocate
Ms Damini Singh Choushan Advocate
Mr. Manik Bhardwaj Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 By this common judgment, two appeals filed by the appellants/claimants against a common award dated 15.12.2007 passed by the learned Motor Accident Claims Tribunal, Jammu (hereinafter referred to as the 'Tribunal') whereby the claim petitions of the appellants have been dismissed, are proposed to be decided.

2 MA No. 41/2008 has been filed by the dependents of the deceased Sh. Vijay Kumar Phull against the impugned award passed by the Tribunal, whereas MA No. 70/2008 has been filed by the

dependents of deceased Sh. Vinod Kumar Sodi against the same award.

3 It appears that the dependents of deceased Sh. Vijay Kumar Phull and Sh. Vinod Kumar Sodi filed two separate claim petitions before the Tribunal claiming compensation on account of death of Sh. Vijay Kumar Phull and Sh. Vinod Kumar Sodi respectively. Both the claim petitions were clubbed together as the same arose out of a single occurrence and were dismissed together by the Tribunal vide the impugned award by holding that it has no jurisdiction to try these claim petitions as the accident has not arisen out of the use of motor vehicle.

4 The facts emerging from the record reveal that on 5.12.2001, Sh. Vijay Kumar Phull, the then Principle District and Sessions Judge, Rajouri proceeded to his home town Poonch in a Maruti Car bearing Registration No. JK02N-8458. He was accompanied by his friend deceased Sh. Vinod Kumar Sodi and two body guards. On reaching Dhonar near Bufliaz, some unidentified militants fired bullets on the said Car in which the deceased were travelling, as a result of which, Sh. Vijay Kumar Phull and Sh. Vinod Kumar Sodi as also the two body guards of Sh. Vijay Kumar Phull lost their lives. According to the claimants, the accident arose out of the use of motor vehicle, whereas according to the respondent/insurer, it was a case of murder and not an accident arising out of the use of motor vehicle. The dependents of deceased Sh. Vijay Kumar Phulll and

Sh. Vinod Kumar Sodi by contending that the accident arose out of use of motor vehicle claimed compensation from the owner and insurer of the vehicle in question. It is pertinent to mention here that the owner of the offending vehicle, who had allowed deceased Sh. Vijay Kumar Phull to use the said vehicle at the time of the occurrence, did not contest the claim petition and he was set *ex parte*. During pendency of the appeals, even the owner is stated to have died.

5 The respondent/insurer in its objections to the claim petitions before the Tribunal has strenuously contended that it is not a case of an accident caused due to rash and negligent act of the driver, nor is it a case of an accident arising out of the use of motor vehicle, as such, the claim petitions are not maintainable. It was submitted by the respondent/insurer that the deceased were killed by the militants as is evident from the police report and, as such, it was purely an act of terrorism and not an accident arising out of the use of motor vehicle. Thus, according to the respondent/insurer, the claimants are not entitled to any compensation from the owner or the insurer of the vehicle in question.

6 On the basis of pleadings of the parties, the Tribunal vide its order dated 30.07.2003, framed the following issues:

> 1. Whether deceased Mr. Vijay Kumar Phull and Mr. Vinod Kumar Sodi while travelling in their Maruti Car bearing registration No. JK02N-8458 on 05.12.2001 was hit by the bullets fired by some unknown persons as a result of which they died on spot ? OPP

2. In case issue No.1 is proved in affirmative how much amount of compensation the petitioners are entitled to in each claim petition ? OPP

3. Whether this Tribunal has no jurisdiction to try these claim petitions as the accident has no arisen out of the use of motor vehicle ? OPR-1

4. Relief .OP Parties.

7 The claimants, in order to support their version of occurrence, have examined the claimants Sema Phull and Naina Sodi, the widows of deceased Sh. Vijay Kumar Phull and Sh. Vinod Kumar Sodi respectively. Besides this, the claimants also examined PWs Tasvir Hussain Shah, Shahid Miraj Rather, Dalip Kumar and Bishan Dass. On the other hand, respondent/insurer has examined RW Raj Kumar to prove its version of occurrence.

8 The Tribunal, after appreciating the evidence on record, decided issue No.1 in favour of the claimants by holding that the deceased had died due to gun shot wounds in indiscriminate firing resorted to by un-identified militants while the deceased were proceeding from Rajouri to Poonch via Deragali in the vehicle in question belonging to respondent No.2. It was also concluded that the occurrence took place at Dhonar jungle on 05.12.2001.

9 Regarding issue No.3, the Tribunal, after appreciating the evidence on record and after discussing the legal position, came to the conclusion that the occurrence was an act of terrorism for which there is no remedy available across the ambit of Motor Vehicles Act, 1988

(the Act of 1988'). The Tribunal further held that the deceased lost their lives not because of an accident arising out of use of motor vehicle.

10 The appellants/claimants have challenged the impugned award passed by the Tribunal on the ground that the expression 'arising out of use of motor vehicle' as mentioned in Section 165 of the Act, has to be given a liberal construction, but the Tribunal has given a very narrow interpretation to the said expression, as a result of which, it has landed into error by holding that it was not a case of accident arising out of use of motor vehicle. It has also been contended that, once issue No.1 was proved in affirmative, it was not open to the Tribunal to refuse to exercise its jurisdiction in entertaining the claim petitions.

11 I have heard learned counsel for the parties and perused the impugned award, the grounds of appeal and the record of the Tribunal.

12 Certain facts, which have emerged from the trial of the case and which are not in dispute are required to be noticed. In fact, these circumstances have been established during the trial of the claim petitions and the Tribunal has returned its findings as regards the manner in which the occurrence has taken place while deciding issue No.1. The findings on this issue have not been disputed by either of the parties.

13 It has been proved that the deceased Sh. Vijay Kumar Phull and Sh. Vinod Kumar Sodi were travelling in the Maruti Car in question on the ill-fated day from Rajouri towards Poonch. It has also

been established from the evidence on record that the vehicle in question was sprayed bullets by un-indentified militants when it reached Dhonar near Bufliaz, as a result of which, both the deceased as well as the body guards of Sh. Vijay Kumar Phull lost their lives. The only question, to be determined is, as to whether the circumstances in which the deceased lost their lives amounts to an "accident arising out of use of motor vehicle", the expressions used in Section 165 of the Act of 1988 or it is a case of pure murder with no element of accident ingrained in it. According to the Tribunal, it was a case of pure and simple act of terrorism and not an accident arising out of use of motor vehicle.

14 Before proceeding to find an answer to the aforesaid question and in order to determine, as to whether or not the view taken by the Tribunal is in accordance with law, it has to be noted that issue No.2 has been framed by the Tribunal in a language which casts burden upon the insurer to prove that it was not a case of an accident arising out of use of motor vehicle and, in case, it succeeded in establishing the same, automatically the Tribunal would have no jurisdiction to try the claim petitions.

15 The expression 'accident arising out of use of motor vehicle' as appearing in Section 165 of the Act of 1988 has been a matter of discussion and interpretation in a large number of cases decided by the Supreme Court and various High Courts. The basic judgment on the issue is the judgment of the Supreme Court in the case

of **Shivaji Dayanu Patil vs. Vatschala Uttam More, 1991 3 SCC 530**. It was a case where a petrol Tanker had a collision with a Truck, as a result of which, the Tanker turned turtle on the national highway. After about four and half hours of the collision, an explosion took place in the Tanker which resulted in breaking out of fire leading to death and injuries to several persons. In the backdrop of these facts, the Supreme Court repelled the contention that there was no causal relationship between collision which took place between the petrol tanker and the Truck and the explosion and fire in the petrol tanker which took place about four and half hours later and, therefore, it was not an accident arising out of use of motor vehicle. While holding so, the Supreme Court based its findings on the interpretation of expression "arising out of" appearing in Section 92A of Motor Vehicles Act 1939 which is in *pari materia* with section 165 of the Act of 1988. Paras (35) and (36) of the judgment are relevant to the context and the same are reproduced as under:

> *"35. This would show that as compared to the expression "caused by", the expression "arising out of" has a wider connotation. The expression "caused by" was used in sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In section 92-A, Parliament, however, chose to use the expression "arising out of" which indicates that for the purpose of awarding compensation under section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in section 92-*

> *A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment.*
>
> *36. Was the accident involving explosion and fire in the petrol tanker connected with the use of tanker as a motor vehicle? In our view, in the facts and circumstances of the present case, this question must be answered in the affirmative. The High Court has found that the tanker in question was carrying petrol which is a highly combustible and volatile material and after the collision with the other motor vehicle the tanker had fallen on one of its sides on sloping ground resulting in escape of highly inflammable petrol and that there was grave risk of explosion and fire from the petrol coming out of the tanker. In the light of the aforesaid circumstances the learned Judges of the High Court have rightly concluded that the collision between the tanker and the other vehicle which had occurred earlier and the escape of petrol from the tanker which ultimately resulted in the explosion and fire were not unconnected but related events and merely because there was interval of about four to four and half hours between the said collision and the explosion and fire in the tanker, it cannot be necessarily inferred that there was no Causal relation between explosion and fire. In the circumstances, it must be held that the explosion and fire resulting in the injuries which led to the death of Deepak Uttam More was due to an accident arising out of the use of the motor vehicle viz. the petrol tanker No. MKL 7461".*

16 From a perusal of the aforesaid ratio laid down by the Supreme Court, it is clear that the expression 'use of the motor vehicle' has been construed by the Supreme Court in a very wider sense and it includes the period when the vehicle is not even moving and is stationary on the road. It is clear that even when the vehicle is immobile, it cannot be stated the motor vehicle was not in use and an accident which arises at a time when the vehicle is not mobile, can well be termed as an 'accident arising out of use of motor vehicle'. Thus, the

contention of learned counsel for the respondent/insurer that, when the accident took place, the vehicle in question was stopped by the militants and, thereafter, fired upon and, as such, it cannot be stated that the vehicle in question was in use at the relevant time is without any substance. The only requirement is that there has to be a causal connection between the use of motor vehicle and the occurrence.

17 Another judgment of the Supreme Court, which is required to be noticed in the context of the instant case, is the judgment in the case of **Rita Devi & ors vs New India Assurance Co.Ltd. & anr, AIR 2000 SC 1930**. It was a case where the passengers travelling in an Auto rickshaw committed the murder of its driver as they intended to commit theft of the Auto rickshaw. The Supreme Court, in the facts and circumstances of the case, held that the death of the deceased Auto rickshaw driver was caused in the process of committing theft of the Auto rickshaw and, as such, the murder of the deceased Auto driver was due to an accident arising out of the use of motor vehicle. Accordingly, the claimants, who were wife and children of the deceased, were held entitled to compensation as claimed by them under the Motor Vehicles Act. The Supreme Court, while determining the question, whether murder can be an accident in a given case, observed as under:

> *"10.The question, therefore, is can a murder be an accident in any given case ? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the*

perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts . The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder".

18 In the same judgment, the Supreme Court, after relying upon the judgment of Court of appeal in **Nisbet vs. Rayne & Burn (1910) 1 Kings Bench 689** and the judgment of House of Lords in the case of **Board of Management of Trim Joint District School vs. Kelly (1914 AC 667),** observed as under:

"14.Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the auto rickshaw, was duty bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto rickshaw and in the course of achieving the said object of stealing the auto rickshaw, they had to eliminate the driver of the auto rickshaw then it cannot but be said that the death so caused to the driver of the auto rickshaw was an accidental murder. The stealing of the auto rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto rickshaw is only

incidental to the act of stealing of the auto rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing the theft of the auto rickshaw".

19 From the foregoing enunciation of law on the subject, it is clear that there has to be a causal relationship between the use of motor vehicle and the accident and then, in a given case, even a murder can be termed as 'an accidental murder'. It will all depend upon the facts and circumstances of the case. If the dominant intention is to kill a particular person, then, such killing is not an accidental murder, but is a murder simplicitor, However, if cause of murder or act of murder was originally not intended and the same has occurred on account of some other felonious act then such murder is an accidental murder.

20 In the light of the aforesaid principles, let us now analyze the factors established in the instant case. There is evidence on record to show that deceased Sh. Vijay Kumar Phull was not the target of the militants and there was no information of his prior visit. This has been clearly stated by PW Dalip Kumar, the then SDPO in his statement. RW Raj Kumar, the witness produced by the respondent/insurer has stated that, on the fateful day, he was driving his Tata Mobile bearing No. 269/DLIU to Deragali. He has further stated that he was stopped by four persons who were wearing army outfits. According to him, thereafter the militants stopped the vehicle in which the deceased

Sh. Vijay Kumar Phull was travelling and they started firing and one of the gun shots hit his conductor.

21 It is pertinent to mention here that, during investigation of the case, statement of Altaf Hussian, Forest Protection Guard was recorded by the police which is available on record of the closure report annexed to the trial Court record. As per his statement, on the fateful day, the militants also stopped a Bus behind the place of occurrence. According to him, one of the militants, who was in Army outfit said that gun men were travelling in the Maruti Car and once he said so, indiscriminate firing took place and the passengers travelling in the said Bus started raising hue and cry. He has also stated that the militants who were in Army outfits, took away the arms and ammunition from the armed guards who were travelling in the Maruti Car.

22 From the foregoing evidence on record, it is crystal clear that the militants did not intend to commit murder of either Mr.V.K.Phull or Mr. V.K.Sodi. It is only when they found two armed persons travelling in the car along with the two deceased, they started indiscriminate firing on the car, resulting in death of all the four, whereafter, they decamped with the arms and ammunitions that was being carried by the armed guards of deceased Sh.V.K.Phull. This clearly shows that the dominant intention of the militants was not to kill Mr V.K.Phull or his associate, but their primary intention was to take away the arms and ammunition from their armed guards. For the said purpose, they had to and they did commit the murder of Sh. deceased

Sh. V.K.Phull and Sh. Vinod Kumar Sodi alongwith their armed guards. The facts emanating from record clearly establish that it was not a case of intentional murder but it was a case of accidental murder.

23 In view of the ratio laid down by the Supreme Court in **Rita Devi's case (supra),** it can safely be stated that the accidental murder of the deceased had arisen out of use of the motor vehicle. Merely because at the time of the occurrence, the vehicle in question was made immobile by the militants, does not mean that the occurrence has not arisen out of use of the motor vehicle.

24 The High Court of Himachal Pradesh in the case of **Himachal Road Transport Corporation and others vs. Om Parkash and others, 1992 ACJ 40** has, in a case where, as a result of explosion of bomb hidden inside the Bus, fatal injuries were caused to certain passengers travelling in the said Bus, held that it was a case of accident arising out of use of the motor vehicle. This Court, in the case of **National Insurance Company vs.Shiv Dutt Sharma and another, 2004 ACJ 2049** in a case where passengers traveling in a Bus were brought down by the militants and thereafter killed by showering bullets over them, held that it was a case of accident arising out of use of motor vehicle and, accordingly, compensation was awarded in favour of the claimants. A Division Bench of this Court, in the case of **Sneh Sharma vs. Sewa Ram and others, 1996 SLJ 151** held that the death or injuries due to terrorist activities to the passengers travelling in

a motor vehicle can give rise to a claim for compensation under the Motor Vehicles Act.

25 *Per contra*, leaned counsel for the respondent/insurer has relied upon a judgment of Gauhati High Court in the case of **Oriental Insurance Co. Ltd vs. Jharna Sarkar and another, AIR 2000 Gauhati 189,** judgment of Patna High Court in the case of **Ranju Rani alias Ranju Devi and others vs. Branch Manager, New India Assurance Company, 2003 ACJ 1588**, judgment of Jharkhand High Court in the case of **Dhela Rani and another vs. Deepak Prasad and others (2009) Acci. C.R 401 and** judgment of the Supreme Court in the case of **Muralidhar Sarangi vs. The New India Assurance Co. Ltd, AIR 2000 Supreme Court 934.**

26 The ratio laid down in the aforesaid cases is not applicable to the facts of the present case. In **Ranju Rani's case** (supra), the death of the claimant had taken place on account of her personal enmity. In **Murlidhar Sarangi's** (supra), the question that fell for consideration before the Supreme Court was, whether or not the risk relating to loss caused to the trucks on account of terrorist activities was covered. It is in these circumstances that the Supreme Court held that as per the terms of the policy, the said risk was not covered, as such, the owners of the Trucks were not entitled to compensation. In **Jharna Sarka's case (supra),** the dominant intention of the extremist was to kidnap and kill the deceased passengers. In was in those circumstances that it was held that it was not a case of accident arising out of use of motor

vehicle. In **Dhela Rani's case (supra),** the offending vehicle was used as a weapon to kill the deceased and it was in those circumstances that it was held that the claim petition for compensation under the Motor Vehicles Act was not maintainable.

27 In the instant case, as already noted, the dominant intention of the militants was to take away the arms and ammunitions of the armed guards of deceased Sh. Vinod Kumar Phull. It is for this reason that they kept on intercepting vehicles passing through that area and ultimately zeroed on the vehicle in which the deceased were travelling. Once they spotted armed guards travelling in the said vehicle, they showered bullets on the vehicle in which they were travelling which resulted in death of all the four occupants of the vehicle. Thus, it was a case of an accidental murder. Therefore, it can safely be stated that the death of the deceased had taken place on account of use of the motor vehicle.

28 The learned Tribunal has, even after noticing all the aforesaid facts as well as the ratio laid down in **Shivaji Dayanu Patil's** case (supra), **Shiv Dutt Sharma's** case (supra) and **Reeta Devi's case** (supra), failed to appreciate these facts in the light of the ratio laid down in aforesaid cases. As a result of this erroneous approach of the learned Tribunal, it came to a wrong conclusion by holding that the occurrence did not take place on account of use of the motor vehicle . The Tribunal has proceeded to throw out the case of the claimants on the ground that the accident did not take place on account of use of

motor vehicle which, as already noted, is contrary to the facts established on record.

29 As already discussed, the accident has clearly arisen out of use of Maruti car in question. The question, whether or not, the occurrence had taken place due to negligence of the driver or any other person could have been determined only after framing an issue on this aspect of the matter. The learned Tribunal has, without framing an issue on this aspect of the matter, proceeded to hold that the occurrence was not caused due to the negligence of any person. In the absence of framing an issue in this regard, the claimants had no opportunity to either produce any evidence in this regard or to address the Tribunal on this question.

30 As per issue No.3, the decision whereof has resulted in dismissal of the claim petitions, the Tribunal was called upon only to decide as to whether the accident had not arisen out of use of motor vehicle. The questions whether the occurrence had taken place due to the negligence of some person and if so, who was responsible for the accident and whether the claim petitions of the dependents of the deceased Sh. Vijay Kumar Phull, who was allegedly driving the vehicle at the time of the occurrence, was maintainable, were never raised before the Tribunal, nor any issue in this regard was framed by the Tribunal. As a result of this, the claimants had no occasion to meet these aspects of the case and the Tribunal proceeded to return findings on these aspects of the case without even hearing the version of the

claimants thereby causing a grave prejudice to their rights. For these reasons, the impugned award passed by the Tribunal particularly its findings on issue No.2 is not sustainable in law and the same deserves to be set aside.

31 Accordingly, both the appeals are allowed and the impugned award passed by the Tribunal is set aside. The claim petitions are remanded to the Tribunal for arriving at a fresh decision in the matter in light of the observations made hereinbefore. It shall be open to the Tribunal to frame additional issues if necessary, and in that eventuality, the Tribunal shall afford opportunity to the parties to lead fresh evidence. The parties are directed to appear before the Tribunal on 31.05.2023. Since the tragic incident has taken place about 22 years back, as such, the Tribunal would do well to dispose of the claim petitions in accordance with law expeditiously preferably within a period six months from the date the parties enter their appearance before it.

Record of the Tribunal along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Jammu
11.05.2023
"Sanjeev, PS"

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