

(2008) 01 MP CK 0027
In the Madhya Pradesh High Court

Ahmed Khan

APPELLANT

Vs

Sher Khan and Others

RESPONDENT

Date of Decision : 15-01-2008

Acts Referred:

Employees State Insurance Act, 1948 — Section 53
Motor Vehicles Act, 1988 — Section 168, 173

Citation : (2008) 119 FLR 873 : (2008) ILR (MP) 860 : (2008) 4 MPHT 372

Hon'ble Judges : S.K. Seth, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.K. Seth, J.—This is claimant's appeal u/s 173 of the Motor Vehicles Act 1988. By the impugned Award, the claim petition filed by the claimant has been dismissed by the Tribunal in view of provision contained in Section 53 of the Employees State Insurance Act, 1948 (for short "1948 Act") Tribunal found and held that the respondent Sirajkhan as also appellant were equally responsible for causing the accident. This finding is not under challenge. It is not disputed that on the fateful day, offending vehicle was insured with National Insurance Company Limited. Tribunal, however dismissed the claim petition in view of Section 53 of the 1948 Act only on the ground that the appellant had already received the lump sum amount of compensation and is getting monthly disability pension at the rate of Rs. 1300.82 from the ESI and as such, he is not entitled to compensation under Motor Vehicles Act, 1988; Hence this appeal.

2. We have heard learned Counsel for appellant and learned Counsel for the Insurance Company and MPSRTC.

3. After having heard rival submission, in our opinion the appeal deserves to be allowed. The moot question is whether the appellant is entitled the compensation under the Law of Torts? Learned Counsel for appellant placed reliance on a decision of this Court in the case of Madhya Pradesh State Road Trans. Corpn. Vs. Praveer Kumar Bhatnagar and Another, and submitted that respondents can

not take the plea that the appellant is not entitled to compensation under the Motor Vehicles Act, 1988. It is pertinent to point out that Section 53 of 1948 Act creates bar only against receiving the compensation for the employment injury. Section 53 came up for consideration of this Court in case of M.P. State Road Transport Corporation (*supra*) and it was held that the claimant could recover the compensation from the owner/driver and insurer of the offending vehicle involved in the road accident. The decision of this Court (*supra*) was later on approved by the Supreme Court in a subsequent decision. The Tribunal dismissed the claim petition only on this technical ground without assessing the amount of compensation. Shri Goyal, Counsel for the Insurance Company is not right in contending that it was a case of composite negligence. As stated herein above, the Tribunal has found that it was a case of contributory negligence. In case of composite negligence the amount of compensation can be recovered from any of the joint tort-feasors. The accident occurred on account of collision between two vehicles and the Tribunal has rightly held that it was a case of contributory negligence.

4. Considering evidence and over all facts, circumstances, disability and permanent pension which has been sanctioned in favour of the appellant, we proceed to decide and assess the amount of compensation instead of remanding the case back. From the evidence available on record it is clear that it was a case of collision between the two vehicles; one being driven by the appellant and driver of the other vehicle was Respondent No. 2-Sirajkhan. Later, vehicle was covered under the insurance policy. Besides the monthly disability pension, the appellant has also got lump-sum amount as he had sustained fracture in tibia and fibula in the lower region of the body. Learned Counsel for Respondent No. 3 submitted that Section 168 of the 1988 Act speaks about payment of just amount of compensation which the appellant under the ESI Act has already received. We are afraid that such a contention could not be acceded to because 1948 Act is a piece of welfare measurement and, it does not debar victim of a road accident to ask for compensation under the Law of Torts. It does not exempt the insurance company from the claim of a third party. If contention of learned Counsel for Respondent No. 3-Insurance Company is accepted, then that would amount to putting a premium on the mis-conduct committed by the driver of the offending vehicle responsible for causing the accident. This is exactly what has been held by the learned Single Judge of Rajasthan High Court as reported in *Oriental Insurance Co. Ltd. Vs. Mohan Kanwar and Others*, . We are in respectful agreement with the view taken by the Rajasthan High Court.

5. As a result we hold that in the present case Respondent Nos. 1 to 3 being owner, driver and insurer of the offending vehicle, can not escape from their liability to avoid payment of compensation under the Law of Torts.

6. The next question that arises is what would be the amount of compensation which the appellant is entitled to recover. It is not in dispute that the Respondent No. 1, on the fateful day, was the owner of the offending vehicle, driven by

Respondent No. 2 and insured with Respondent No. 3. The Tribunal has found that it was a case of contributory negligence of the appellant and Respondent No. 2-driver of the offending truck. Therefore, negligence has been apportioned in equal measure. Although learned Counsel for appellant tried to assail this finding but we are not impressed with the contention advanced in that regard and find that the Tribunal has rightly held that the appellant as well as Respondent No. 2 were equally responsible for causing the accident and thus, contributed towards accident. Learned Counsel for appellant submitted that because of injuries and permanent nature of disability suffered by the appellant, he can not drive any vehicle. As a result he was given a table work which he continued to do till he attained the age of retirement. It was also pointed out that for a month he remained in hospital in Indore and Mandsaur for treatment of the injuries sustained by him. It was also contended that the said absence has been regularized by the employer as leave without pay (LWP) and no wages were paid to the appellant for this absence of 713 days. Because of the non-payment of salary on account of LWP as aforesaid, the appellant has also not received bonus. Therefore, the appellant is entitled to receive just amount of compensation from respondents.

7. We find that the action of Respondent No. 4 to treat the absence period as LWP was incorrect and illegal. Appellant is entitled to wages but not to bonus for the said period because the bonus is attached and linked to the quantum of the work done by an employee under the establishment of MPSRTC. In the facts and circumstances of the case, we hold that the appellant is entitled on all pecuniary and non-pecuniary heads Rs. 1,00,000/- (one lakh) as compensation. However, in view of the finding of contributory negligence, the appellant would be entitled to receive from respondents jointly and severally a sum of Rs. 50,000/- (fifty thousand) only, together with interest at the rate of 9% from today. We further direct that employer, MPSRTC (Respondent No. 4) shall pay the wages for the period during which appellant was absent from duty on account of his hospitalization. Said amount shall be calculated and paid to the appellant within one month from today; failing which it would also carry interest at the rate of 9% from the date of this order till it is actually paid to the appellant.

In the result, this appeal is allowed in part to the extent indicated herein above. There shall be no order as to costs.