

(2017) 08 RAJ CK 0061
In the Rajasthan High Court
Case No : 309 of 1999

Ganga Hurkat & Ors.

APPELLANT

Vs

Dilipsingh & Ors.

RESPONDENT

Date of Decision : 22-08-2017

Acts Referred:

Citation : (2017) 08 RAJ CK 0061

Hon'ble Judges : Arun Bhansali

Bench : SINGLE BENCH

Advocate : J.R. Choudhary, Sanjeev Johari, Lalit Parihar

Judgement

1. This appeal is directed against the judgment and award dated 28.1.1999, passed by the Motor Accident Claims Tribunal, Merta ("the Tribunal"), whereby, the Tribunal has dismissed the application for compensation filed by the appellants. The application for compensation was filed by the claimants with the averments that on 11.2.1994, Hari Prasad - husband / father of the claimants was driving motorcycle from his house on way to his godown at Borawad and when he reached near National Hotel, the offending truck, which was being driven by Dilip Singh rashly and negligently, collided with the said motorcycle on the wrong side resulting in grievous injuries to Hari Prasad to which he succumbed.

2. It was claimed that the deceased was involved in marble business and used to earn Rs.3,000/- p.m., based on the said averments, compensation to the tune of Rs.26,69,000/- was claimed. The application was resisted by the owner of the truck as well as the Insurance Company. While the owner disputed the quantum of compensation sought and the fact of accident having occurred on account of negligence of the driver of the truck, the respondent No.3 - Insurance Company claimed that the deceased was not in possession of a valid driving licence, he himself collided with the truck and as the driver of the truck was not in possession of valid driving licence, the Insurance Company was not liable.

3. The Tribunal framed five issues. On behalf claimants, two witnesses Manak Chand (AW/1) - brother of the deceased and Ganga (AW/2) - wife of the deceased were examined. On behalf of the Insurance Company Gopal Narula (NAW/1) was examined and the driver was examined as NAW/2. After hearing the parties, the Tribunal came to the conclusion that the claimants did not say anything in the statement about the rashness or negligence of the driver of the truck and made a bald statement that the accident occurred on account of mistake of the driver of the truck and as there was no evidence available on record regarding the negligence of the driver, decided the issue against the claimants.

4. While deciding the issue pertaining to the liability of the Insurance Company, it was found that the driving licence (Ex.7) was valid for the period 29.8.1988 to 28.8.1991 and that from the report of RTO (Ex.A/2) produced by the Insurance Company even the said licence was fake, for violation of policy conditions, the Insurance Company was not liable. As the Tribunal had decided that the issue pertaining to rash and negligent driving by the truck driver against the claimants, the issue pertaining to quantum of compensation was not decided and the claim application was rejected.

5. It was submitted by learned counsel for the appellants that the Tribunal committed grave error in deciding issue No.1 against the claimants. It was submitted that it was the specific case of the claimants in the application for compensation that the deceased was driving the motorcycle on the correct side of the road and the offending truck, which was being driven rashly and negligently, came on the wrong side and struck the motorcycle resulting in grievous injuries to Hari Prasad to which he succumbed. It was submitted that the claimants had produced the relevant documents alongwith the challan, which was filed against the driver of the truck finding him guilty for rash and negligent driving as Ex.1 to Ex.10.

6. The site map prepared by the police (Ex.3) clearly supports the plea taken by the claimants in their application and, therefore, the Tribunal was not justified in deciding the issue against the claimants. Further submissions were made that even if it is held that the Driver of the offending truck was not in possession of valid driving licence/he was in possession of a fake driving licence and the Insurance Company was liable to be exonerated on that count, in view of the law laid down by Hon'ble Supreme Court in the case of National Insurance Company v. Swaran Singh & Ors.: 2004 (3) SCC 297, a direction to pay and recover deserves to be made in the present case.

7. Further reliance was placed on judgment in National Insurance Company Ltd. v. Geeta Bhat & Ors.:2008 ACJ 1498. It was also submitted that it was proved on record that the deceased was involved in marble business and the claimants had claimed a moderate income of Rs.3,000/- p.m. only and, therefore, the claimants are entitled to compensation as claimed in the application. It was prayed that the appeal be allowed, the findings recorded by the Tribunal be set aside and the

claimants be awarded just compensation.

8. Learned counsel appearing for the respondent - Insurance Company vehemently opposed the submissions made. It was submitted that the appellants have utterly failed to prove the negligence of the driver of the offending truck, inasmuch as, only bald statements were made by both the witnesses produced on behalf of the appellants and, therefore, the Tribunal was justified in coming to the conclusion that negligence of the driver of the truck was not proved. Further submissions were made that the licence produced as Ex.7 by driver of the truck was for the period 29.8.1988 to 28.8.1991 and the accident occurred on 11.2.1994 and, therefore, the present was a case of no licence at the time of accident.

9. Further submissions were made that even as per the report of RTO (Ex.A/2), even the licence relied on was a fake licence, inasmuch as, the same has been issued in the name of one Sudhir Kumar and not in the name of driver - Dilip Singh and, therefore, the Insurance Company was rightly exonerated by the Tribunal. Reliance was placed on judgment of Hon"ble Supreme Court in National Insurance Company Ltd. v. Vidhyadhar Mahariwala & Ors.: 2008 (12) SCC 701 and Bhuwan Singh v. Oriental Insurance Co. Ltd. & Ors. :2009(5) SCC 136.

10. I have considered the submissions made by learned counsel for the parties and have perused the material available on record. The claimants in their application for compensation had specifically averred that the deceased was driving his motorcycle on the correct side of the road and the driver of the truck came on the wrong side of the road and struck the motorcycle resulting in grievous injuries to Hari Prasad to which he succumbed.

11. On behalf of the claimants two witnesses AW/1 - Manak Chand/brother of the deceased was examined, who stated that the accident occurred on account of mistake of the truck driver, the statement indicates that he claimed that he was present at the time of accident. FIR (Ex.1), charge-sheet(Ex.2), site map (Ex.3), post mortem report (Ex.4) etc. were exhibited by him. In the cross-examination he stated that he reached the site of accident after the accident. He also stated that deceased was driving the motorcycle and one Raju was the pillion rider. AW/2 - Ganga in her statement indicated that the truck was being driven rashly and negligently by its driver - Dilip Singh, who struck the motorcycle resulting in grievous injuries to her husband to which he succumbed.

12. A bare look at the documents exhibited by the claimants would reveal that the charge-sheet was filed against the driver of the truck finding him guilty of rash and negligent driving of the truck resulting in accident. The site map (Ex.3) is telltale, wherein the truck in question was lying on the extreme right side of the road and the motorcycle as well as the blood-stains were on extreme left side of the road. Admittedly the truck was going from Borawad to Makrana and the deceased was riding towards Borawad and, therefore, the deceased was driving the motorcycle on his correct side, while the truck was on the wrong side.

The principles of *res ipsa loquitur* are clearly applicable to the circumstances of the case. The finding of the Tribunal, that as the brother of the deceased only stated that the accident occurred on account of mistake of the driver of the truck, rash and negligent driving by the driver of the truck was not proved, is based on too pedantic an analysis of the evidence led by the brother and wife of the deceased.

13. The material available on record clearly indicates rashness and negligence on part of the driver of the truck, which resulted in the accident and consequential death of Hari Prasad, in view thereof, the finding of the Tribunal on issue No.1, cannot be sustained, the same is, therefore, set aside and it is held that the accident occurred on account of rash and negligent driving by the driver of the truck.

14. So far as the issue pertaining to the quantum of compensation is concerned, the Tribunal in view of its finding on issue No.1, did not deal with the said aspect. It was claimed by the claimants in their application that the deceased was involved in marble business and used to earn Rs.3,000/-p.m. The brother of the deceased (AW/1) / Manak Chand in his statement indicated that the deceased was aged 27 years at the time of accident, his income was Rs.3,000/- p.m. and in his cross-examination stated that his brother was not pay income-tax and was not keeping any books of accounts.

15. AW/2 - Ganga in her statement indicated that the age of the deceased was 27 years; he was involved in marble business; used to earn Rs.3,000/- p.m.; spend Rs.500/- on his ownself and contribute Rs.2,500/- towards the family. The wife alongwith two minor children were dependent on him. In her cross-examination the witness indicated that her husband used to purchase and sell marble tiles. The statement of two witnesses and the crossexamination, alongwith moderate income, which was claimed by the claimants for a 27 years old businessman at Rs.3,000/- p.m., cannot be said to be out of proportion and/or excessive so as to disbelieve the claim of income and/or the income as such.

16. Further, looking to the fact that he was supporting a family of three persons having his wife and two children i.e. son -Sonu aged 1 year 9 months and daughter - Rekha aged 2 months only, the income of the deceased is assessed at Rs.3,000/- p.m., as there were three dependents, deducting 1/3rd towards personal expenses of the deceased, the claimants would be entitled to compensation for loss of income at $\text{Rs.}2000 \times 12 \times 17 = \text{Rs.}4,08,000/-$.

17. Further the wife is entitled to compensation towards loss of consortium and the minor children are entitled to loss of love & affection, while the wife is entitled to Rs.50,000/- towards loss of consortium, the two minor children are entitled to 20,000/- each towards loss of love & affection, towards funeral expenses, the claimants are entitled to a sum of Rs.5,000/- and towards transportation expenses, the claimants are entitled to a sum of Rs.2,000/- and in all the claimants are entitled to a sum of Rs.5,05,000/- as compensation.

18. So far as the issue pertaining to the liability of the Insurance Company is concerned, from the material available on record, it is apparent that the driving licence (Ex.7) relied on by the driver was for the period 29.8.1988 to 28.8.1991 and though the driver in his statement stated that he had a valid driving licence, he did not produce anything beyond the said Ex.7 with which he was confronted. Further the report (Ex.A/2) produced by the Insurance Company indicated that even the said licence (Ex.7) was fake, inasmuch as, the RTO in his report (Ex.A/2) reported that the said licence was issued in name of one Sudhir Kumar and that also authorizing him to drive motorcycle only.

19. In view of the above material, which came on record, it is apparent that at the time of accident, the driver was not in possession of valid driving licence and, therefore, the Insurance Company cannot be held liable for making payment of amount of compensation. However, in the case of Swaran Singh (supra) Hon"ble Supreme Court in a situation as above laid down as under: "110. The summary of our findings to the various issues as raised in these petitions are as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition, e.g. disqualification of driver or invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof where for would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with Sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by Sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal."

Similarly in the case of Geeta Bhat (supra), the judgment in the case of Swaran Singh (supra) was followed.

20. The judgments cited on behalf of the appellant - Insurance Company pertain to the liability of the Insurance Company, which has already been determined hereinbefore. However, the Insurance Company though not liable, a direction regarding "pay and recover" can be passed in the circumstances of the case, wherein, admittedly on the date of accident, the vehicle was insured by the respondent - Insurance Company as the policy (Ex.6) indicates the period of Insurance as 12.7.1993 to 11.7.1994 and accident has been occurred on 11.2.1994 and the deceased is a third party.

21. In view of the above discussion, the appeal filed by the claimants is allowed. The award dated 28.1.1999 passed by the Tribunal, is set aside and it is held that the claimants are entitled to compensation of Rs.5,05,000/- alongwith interest @ 7% p.a. from the date of application i.e. 7.5.1994 to the date of actual payment from the owner and driver of the vehicle. The compensation shall be paid 70% to Smt. Ganga/wife of the deceased and 15% each to Sonu (son) and Rekha (daughter). As already a long time has elapsed since the death of Hari Prasad, the amount be paid in the saving bank account of the claimants.

22. The respondent - Insurance Company shall make payment of the amount of compensation alongwith interest within a period of six weeks from the date of this judgment and would be entitled to recover the same from the owner / driver of the vehicle by directly filing execution application before the Tribunal. No order as to costs.