
(1997) 10 MP CK 0031
In the Madhya Pradesh High Court
Case No : M.A. No. 692 of 1994

Ghanshyam Patel and Another	Vs	APPELLANT
Vijay Kumar Dubey and Another		RESPONDENT

Date of Decision : 08-10-1997

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 110B, 95(2)

Citation : (1999) ACJ 1561 : AIR 1998 MP 216

Hon'ble Judges : S.K. Dubey, J; Dipak Misra, J

Bench : Division Bench

Advocate : Rakesh Jain and Vivek Rusia, for the Appellant; N.S. Ruprah and G.C. Jain, for the Respondent

Judgement

Dipak Misra, J.—Feeling dissatisfied with the award dated 15-7-1994 passed in Motor Accident Claim Case No. 386/94 (initially M. v. case No. 11/84) by the Addl. Motor Accident Claims Tribunal, Jabalpur, the claimant, the owner and the driver, and the insurer have invoked the appellate jurisdiction of this Court for mitigation of their respective grievances. As the same award is assailed by the affected parties, each from his own standpoint, these appeals were heard analogously and are disposed of by this common order.

2. The factual scenario as has been depicted is that on 8-3-83 at about 9 p.m. when Vijay Kumar Dubey, the claimant (appellant in M.A. No. 850/ 94) was returning to his home after his duty hours in Hitkarani Law College, Jabalpur situate at the road leading from Tularam Chouk towards Omti crossing, the jeep bearing registration No. MVJ-2369, owned by Ghanshyam Patel being driven in a rash and negligent manner near the Sub-Station Mardhatal M.P. Electricity Board, dashed against the cycle of the claimant as a result of which both the legs of the claimant were crushed under the wheels of the said vehicle. The victim of the accident was admitted in the Medical College Hospital, Jabalpur where his left leg was amputated and a rod was inserted in his right leg. He had to remain as an indoor patient from 8-3-83 to 7-4-83. An FIR was lodged at Lordganj Police

Station, Jabalpur and the criminal law was set in motion. The claimant, sent a notice on 19-5-83 claiming damages but there was no response either from the owner or from the insurer. It has been asserted in the petition that the victim was getting Rs. 449.20 paise towards his salary from the College and he would have served for a number of years as he was only 30 years old at the time of the accident. There was possibility of his getting into promotional cadre. On various heads namely, loss of earning, mental shock and agony, medical expenses and the damage to the cycle and expenses incurred in sending the legal notice, he claimed a compensation of Rs. 3,02,510/-.

3. The said application was resisted by the owner asserting that his jeep was in the house of one Dal Singh Patel and was not road worthy and, therefore, the question of claimant becoming a victim of an accident due to the rash and negligent driving of the driver of the vehicle did not arise. The driver Dinesh Kumar filed his written statement contending that he was not driving the vehicle as he did not know how to drive a vehicle and, therefore, putting the blame on him for rash and negligent driving was absolutely unjustified.

The insurance company in its written statement, controverted the averments and pleaded that the vehicle bearing registration No. MVJ-2639 was not insured with it but the vehicle bearing registration No. GJH-517 was insured. The further plea of the insurer was that its liability was confined to Rs. 50,000/- the same being the statutory liability.

4. On consideration of the materials on record the Tribunal came to hold that the vehicle in question had caused the accident and it was driven in a rash and negligent manner by the driver-non-applicant No. 2 therein; the victim was entitled to Rs. 7000/- towards expenses incurred by him; and Rs. 86,400/- and Rs. 5000/- towards disability and mental agony respectively. Thus he awarded Rs. 98,400/-. Interest at the rate of 12% per annum from the date of application was also awarded. The Tribunal confined the liability of the insurer to Rs. 50,000/-. The balance amount was directed to be paid by the owner and the driver.

5. The grievance of the claimant relates to non-granting of the amount claimed for. The owner and the driver have preferred M.A. No. 692/94 challenging the quantum of compensation as well as confining of the liability of the insurer to Rs. 50,000/-. The insurance company in its appeal (M.A. No. 908794) has questioned the sustainability of the award on the ground that the driver was not possessed with a driving licence and, therefore, there was a clear breach of the condition of the policy, and hence the insurer should not have been directed to indemnify the owner.

6. We have heard Mr. G.C. Jain, learned Counsel for the claimant, Mr. Rakesh Jain and Vivek Rusia learned Counsel for the owner and driver and Mrs. N. S. Ruprah, learned Counsel for the insurance company. We would briefly state their respective contentions. Learned counsel appearing for the claimant has

canvassed that the Tribunal has seriously erred in not allowing the total claim as set forth by the claimant and the reasonings for the refusal are sensitively susceptible. He has also criticised the determination of the liability of the insurer on the ground that the concept of statutory liability is not attracted to a jeep as the said vehicle is not covered within the mischief of Section 95(2)(a) and (b) of the Act, but comes within the sweep of Section 95(2)(c) of the Act. Mr. Rakesh Jain and Mr. Vivek Rusia, learned counsel appearing for the owner and the driver have contended that the finding of the Tribunal that the vehicle was involved in the accident and the driver was rash and negligent are unsupportable inasmuch as they are not based on proper appreciation of evidence on record. Their alternative submission is that if the award is sustained or if the quantum is enhanced, the liability should be saddled with the insurer. Mr. Ruprah learned Counsel for the insurance company impugning the award has built up his argument on the foundation that once the driver has himself admitted that he was not knowing the driving it is to be presumed that he had no driving licence, and that being a fundamental breach of the policy, the Tribunal should have exonerated the insurance company and should not have held it liable. It is also proposed by him that under no circumstances the liability of the insurer would be more than Rs. 50,000/- as the concept of limited liability as envisaged under the provisions of old Act would be applicable.

7. On a perusal of the award we find that the Tribunal has taken into consideration the institution of the criminal case against the driver u/s 304A of the Indian Penal Code. The Tribunal has also placed reliance on Ex. P.3, the medical certificate wherefrom it becomes apparent that the non-applicant No. 2 was driving the jeep in question and had sustained injuries. The report also reflects that the said driver had consumed alcohol. The analysis of the Tribunal is based on materials on record and supported by cogent and acceptable reasons. Mr. Ruprah, learned counsel appearing for the insurer has strenuously urged that the finding of the Tribunal relates to driving of the vehicle in question by the non-applicant No. 2 but the said driver having himself admitted that he did not have driving licence, there is fundamental breach of the policy for which the insurance company is entitled to be absolved. To appreciate the submission of Mr. Ruprah we have perused the written statement filed on behalf of the insurance company and we find there is no pleading relating to the valid driving licence. In fact, because of absence of pleading no issue was framed by the Tribunal. The learned Counsel has laboured hard to build up the argument on the basis of the written statement filed by the owner and driver. When the insurance company had not taken the plea and the plea of the driver is that he was not at the wheel as he did not know driving, it would be an extremely uncalled for proposition to infer from these surrounding circumstances that the driver did not have the driving licence. If the insurance company had the desire to combat the claim on the ground of fundamental breach of policy, the essential pleading to that effect should have made in the written statement. If the insurance company wants to absolve itself from the liability on this ground, then it was incumbent on it to put

forth positive pleading and adduce adequate evidence in that regard. In this context we may refer to the decision rendered in the case of *Narcinva v. Kamat v. Alfredo Antonio Doe Martins* 1985 ACJ 397 : AIR 1985 SC 128), wherein their Lordship of the Apex Court registered their view in the following terms (at page 1284 of AIR);

"The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of term of contract permits a party to the contract not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led."

This Court in the case of *Radheshyam and Another Vs. Nasir Hussain and Others, and Lalchand Vs. Kanta and Others, ,* has also taken the view that the insurance company is required to prove by leading cogent evidence that the driver was not holding valid licence. The burden of proof is squarely on the insurer.

Tested on the anvil of the aforesaid principles of law we are of the considered view that the fundamental breach which is vehemently canvassed before us has no legs to stand upon because of lack of foundation and proof. The insurance company cannot be permitted to build a castle in the air.

8. Now we shall proceed to deal with the rest of the contentions, namely, there should be enhancement of compensation and the liability of the insurer cannot be limited because of the nature of the vehicle in question, From the factual matrix it is beamingly clear that the claimant had sustained the injuries as stated by him. It is clearly demonstrable from record that both the legs of the victim were crushed under the jeep and the left leg was amputated. Because of the handicap he has lost his job. The Tribunal has applied the principle of multiplier by taking into consideration the income of the petitioner. The approach of the tribunal is entirely erroneous as compensation was claimed in personal injury action. In the cases of personal injury both pecuniary and non-pecuniary losses are to be taken into consideration. The view of ours gains support from the decision rendered in the case of *Jai Bhagwan Vs. Laxman Singh and Others, .-*In the case of *R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, ,* their Lordships again emphasised on the grant of compensation on the basis of pecuniary and non-pecuniary damages. The view was expressed thus :

"Broadly speaking, while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant; (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other mental loss. So far non-

pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

Recently in C. A. No. 45567/96 (Shashendra Lahri v. UNICEF), disposed of on 6-12-96, the Apex Court in the case of permanent disability due to shortening of the right leg by 3" of the victim of the accident awarded Rs. 4,00,000/-with interest thereon at the rate of 12% per annum from the date of claim till the date of payment and it was awarded in addition to the amount of Rs. 58,000/- awarded by the High Court.

Applying the aforesaid parameters to the obtaining factual matrix and giving due weightage to the mental anguish and agony of the victim of the accident, we are of the considered view that the non-pecuniary damages should be enhanced to Rs. 1,40,000/-. The pecuniary damage assessed at Rs. 7,000/- by the Tribunal is maintained. Thus the claimant would be entitled to Rs. 1,47,000/-:

9. Now to the next contention which has been raised either one way or the other in all the appeals. Learned Counsel for the owner and the driver as well as the claimant contended that the liability of the insurance company is unlimited whereas the learned counsel for the insurance company has supported the conclusions of the Tribunal limiting the liability of the insurer to Rs. 50,000/-. Mr. Ruprah, learned Counsel for the insurance company has submitted that once the statutory limit is fixed the same has to be respected. To substantiate his contention he has referred to Section 95(2) of the Motor Vehicles Act, 1939 which reads as under:

"Section 95(2).-- Subject to the proviso to Sub-Section (1) a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely :--

(a) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment;

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual

passenger;

(c) save as provided in Clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;

(d) irrespective of the class of the vehicle, a limit of rupees six thousand in all in respect of damage to any property of a third party,

Submission of Mr. Ruprah is that a limit being fixed, the liability of the insurance company has to be limited. He also contended that liability can be enhanced if extra premium is paid but as in the instant case no extra premium was paid the liability has to be confined to the limit fixed under the statute.

10. There is no doubt that limit fixed under the statute has to have full play unless it is proved that extra premium was paid for enhancement of the liability. If the insurance company pleads with regard to the limited liability and satisfies the Court by producing the policy, effect of the limited liability has to be accepted. But, if the insurance company does not plead so and does not bring the insurance policy on record in spite of direction to the said effect the Court is entitled to draw adverse inference. The question of limited liability is relatable to Section 95(2)(b) wherein reference has been made in respect of certain type of vehicles. It does not cover all sorts of vehicles. Sub-Section (c) of the aforesaid section deals with vehicles of all other categories. If a vehicle falls u/s 95(2)(c) the liability of the insurer will be undisputedly unlimited. In the case at hand there is no material on record with regard to the nature of use of the vehicle. As pleaded by the insurance company, the vehicle is covered u/s 95(2)(b), that is to say, the vehicle is used to carry passengers for hire or reward or in pursuance of a contract of employment. On perusal of the certificate of the insurance company, Ex. P.5, we find that a limitation has been prescribed and it stipulates that the policy covers use for any purpose other than hire or reward. No material has been brought on record by the insurance company to establish that the vehicle in question was a transport vehicle for passengers or was utilised for carrying goods. In view of this factual backdrop we are inclined to hold that the vehicle would fall within the category given u/s 95(2)(c) of the Act. Thus, the liability of the insurance company would be unlimited, and therefore, the amount awarded by us shall be deposited by the insurance company within six weeks from today before the Tribunal with interest as directed failing which the same shall carry interest at the rate of 15% per annum from the date of application of claim.

11. In the result, the appeal preferred by the claimant, M.A. No. 850/94, is allowed in part; the appeal preferred by the owner and the driver forming the subject-matter of M.A. No. 692/94 is also allowed in part, and the appeal preferred by the insurer, M.A. No. 908/94 is dismissed. However, in the peculiar circumstances of the case the parties shall bear their respective costs of these appeals.