(2009) 04 AHC CK 0244

In the Allahabad High Court

Case No : First Appeal From Order No. 273 of 2003

Malti Devi & Ors. APPELLANT

Vs

Raj Bahadur & Ors. RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:
Motor Vehicles Act, 1988 — Section 168

Citation : (2009) 04 AHC CK 0244

Hon'ble Judges : Devi Prasad Singh, J and Ritu Raj Awasthi, J

Final Decision : Allowed

Judgement

1. Heard learned counsel 1 for the appellant Shri Manoj Kumar Gupta and Shri Rajesh Nath for the respondents and perused the record.

2. The present appeal has been preferred under Section 173 of the Motor Vehicles Act against the impugned award dated 2722003 passed by the Motor Accident Claims Tribunal Raebareily/6th Additional Judge, rejecting the appellants claim with regard to compensation, claimed under section 166 read with section 168 of the Motor Vehicles Act. 3. In brief, on 212001 the deceased Shri Dinesh Kumar while driving the Jeep No. U.P. 33 B 4045 suffered with an accident on Lucknow Raebareilly road near Kundanganj. The Jeep is owned and possessed by one Shri Raj Bahadur. The wife, son, daughter and parents of deceased Dinesh Kumar(appellants) had approached the Motor Accident Claim Tribunal for payment of compensation under Section 166 of the Motor Vehicles Act. According to claimants the monthly income of deceased was Rs. 5,000/ per month. A defence was taken by the respondents that accident occurred because of fault of Shri Dinesh Kumar himself hence no compensation is payable. Also a defence was taken with the pleading that even otherwise in case the dependants of Dinesh Kumar are entitled for compensation then they should approach the competent authority under the Workmen''s Compensation Act. The Tribunal had framed the following issues for adjudication :

1. Whether on 212001 on Lucknow Raebareli road near Kundanganj the Vehicle

No. 33B 4045 suffered with an accident and in consequence to which the Dinesh Kumar succumbed to injuries at the spot.

2. Whether the vehicle No. U.P. 33 B 4045 is suffered to accident on 2212001 was insured with the national insurance company (respondent No. 2).

3. Whether the driver of the Jeep another Jeep No. 33 B 4045 was having valid licence on the date of accident in case yes then it is correct.

4. Whether the claimants are entitled for compensation. In case, yes, then what should be quantum of compensation.

4. It has been not disputed that the vehicle in question namely UP 33 B 4045 met with an accident on 2212001. In the written statement filed by the respondents the occurrence of accident has been admitted. However, defence has been taken by the respondents that the accident occurred because of fault on the part of deceased Dinesh Kumar himself. Deceased Dinesh Kumar succumbed to injuries at the spot. It has been not disputed before Tribunal that Dinesh Kumar was having valid driving licence and he was driving the Jeep in the night when he suffered the accident. However, the Tribunal arrived to the conclusion that since Dinesh Kumar himself was at fault the dependants are not entitled for payment of any compensation. The Tribunal further recorded a finding while deciding issue No. 3 that the deceased Dinesh Kumar, driver of the Jeep was having driving licence which was valid from 1461999 to 642018. At the time of death, the age of the Dinesh Kumar was 30 years 8 months. The Tribunal observed that the income of the deceased may not be five thousand per month on account of fact that in every month his discharge of duty was not more than 15 days.

5. However, while defending the impugned award, learned counsel for the respondents reiterated the finding recorded by the Tribunal with the submission that since Dinesh Kumar was at fault, no compensation is liable to be paid to the dependants of the deceased. It is further submitted by the respondents counsel that even if the dependants are entitled for the compensation, they should approach the competent authority under the Workmen Compensation Act.

6. Now, coming to the first question as to whether the deceased was at fault, we find that the finding of fact recorded by the Tribunal seems to be perverse and based on unfounded ground. In the statement of Raj Bahadur, it has come to light that because of a layer of Mobil oil spread over the road, the accident occurred in the night when the deceased was passing from the specified area. However, there is one material evidence of which the Tribunal could not take notice.

7. From the report of the police of police Station Bachhrawa, it appears that specific observation has been made that since the front right side tyre of the jeep was burst, the driver lost his balance and dashed with the tree on down right side of the road. The statement of Shri Raj Bahadur, coupled with the factual

observation made by the police in its report indicates that the deceased Dinesh Kumar was not at fault.

8. Apart from above, the Tribunal has not framed any issue with regard to negligence on the part of the deceased or any other party. In absence of any such issue, the appellants were having no opportunity to lead evidence to rebut the finding recorded by the Tribunal. In case the Tribunal was of the view that because of negligence on the part of Dinesh Kumar, the accident occurred, the appellants should have persuaded the Court to frame issue on the question involved. However, as observed, the deceased Dinesh Kumar does not seem to be at fault. Accordingly, we are of the view that the Tribunal was not correct in recording a finding that because of negligence on the part of the deceased, the accident occurred disentitling the claimants/appellants to seek compensation from the Tribunal.

9. Learned counsel for the appellants has invited attention of this Court towards a judgment of Hon''ble Supreme Court reported in [2005(2)JCLR 786 : (AIR 2005 SC 2337) (SC)] National Insurance Co. limited v. Prembai Patel and others where the compensation was not awarded by the tribunal on the ground that the deceased himself was responsible for the accident. Hon''ble Supreme Court observed that where a person sustained injury or where death resulted from an accident, then in such situation, the legal representative of the deceased can claim compensation under Section 166 of the Motor Vehicles Act and it is not necessary for the Tribunal to record a finding for relegation of the controversy to the competent authority under the provisions of Workmen Compensation Act. For convenience, relevant portion from the judgment of Prembai Patel (supra) is reproduced as under:

"6. A person, who has sustained injury or where death has resulted from an accident all or any of the legal representatives of the deceased can claim compensation by moving an application under Section 166 of the Act by filing a claim petition before the Motor Accident Claims Tribunal. Section 3 of the Workmen''s Compensation Act lays down that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the said Act. Section 167 of the Motor Vehicles Act, 1988 lays down that notwithstanding anything contained in the Workmen''s Compensation Act, 1923 where the death of, or bodily injury to, any person gives rise to a claim for compensation under the Act and also under the Workmen''s Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. The claim petition had been filed by respondents 3 to 6 claiming compensation for the death of Sunder Singh, who was an employee of respondent No. 2, in an accident arising out of and in the course of his employment. Therefore, they could claim compensation under either of the Acts. But they chose the forum provided under the Motor Vehicles Act. In a petition under the Workmen''s

Compensation Act the injured or the legal heirs of the deceased workmen have not to establish negligence as a precondition for award of compensation. But the claim petition before the Motor Accident Claims Tribunal is an action in tort and the injured or the legal representatives of the deceased have to establish by preponderance of evidence that there was no negligence on the part of the injured or deceased and they were not responsible for the accident. The exception to this general rule is given in Section 140 of the Act where the legislature has specifically made provisions for payment of compensation on the principle of no fault liability."

"12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles against third party risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XL Clause (b) of subsection(1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in subsection (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Subclauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both ''any person'' or ''passenger''. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words ''any person'' occurring in subclause (i). However, the proviso (i) to clause (b) of subSection (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen''s Act if the employee is such as described in subclauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen''s Act in respect of death of or bodily injury to any such employee as is described in subclauses (a) or (b) or (c) of proviso (I) to Section 147(1)(b). it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third party risks. The expression "such liability as is required to be covered by a policy under clause (b) of subsection (1) of section 147 (being a liability covered by the terms of the policy)" occurring in subsection (1) of Section 149 is important. It clearly shows that any such liability, which is mandatory required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen''s Act in respect of death of or bodily injury to any such employee as described in subclauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen''s Act."

"13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in subclauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen''s Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."

"14. The aforesaid interpretation of the relevant provisions applicable to the case in hand is in consonance with the view expressed by a Constitution Bench in New India Assurance Co. Ltd. v. C.M. Jaya and others, (2002) 2 SCC 278 : (AIR 2002 SC 651) where, while interpreting the provisions of Section 95(2) of Motor Vehicles Act, 1939, the Court held as under in para 10 of the report:

"..........................The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible."

The Bench also referred to earlier decisions rendered in New India Assurance Co. Ltd. v. Shanti Bai, (1995) 2 SCC 539 : (AIR 1995 SC 1113) and Amrit Lal Sood v. Kaushalya Devi Thapur, JT (1998) 3 SCC 744 : (AIR 1998 SC 1433) and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the insurance company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability."

10. The judgment of Hon''ble Supreme Court in the case of Prembai Patel (supra)

has been delivered by three Hon''ble Judges. The case relied upon by the tribunal reported in (1977) 2 SCC 441 : (AIR 1977 SC 1248) Minu B. Mehta and another v. Balkrishna Ramchandra Nayan and another seems to be based on different facts and circumstances and is not applicable under the facts and circumstances of the present controversy. Accordingly, we are of the view that the claimants shall be entitled for compensation.

11. Now coming to the question for payment of compensation. The monthly income shown by the claimants of the deceased was Rs.5,000/ per month. However, a finding has been recorded that in a calender month, the deceased was working only for fifteen days as driver of the vehicle, hence the income could not be Rs.5,000/ per month. The tribunal has observed that the submission of the claimants to record the income of the deceased at the rate of Rs.5,000/ per month seems to be not sustainable. No cogent trustworthy material evidence has been led by the claimants to establish that the income of the deceased was Rs.5,000/ per month. Accordingly, we are of the view that the compensation should be given to the deceased on the basis of notional income provided under the Act. Though under Schedule2, the notional income has been provided at the rate of Rs.15,000/ per year but in recent judgment, reported in 2008(2) TAG 394 (SC) : (2008

(3) ALJ 612)" Laxmi Devi and others v. Mohammad Tabbar and another, Hon''ble Supreme Court held that the minimum income even notionally should not be less than Rs.3,000/ per month. Accordingly, in case the income of the deceased is assessed at the rate of Rs.3,000/ per month and l/3rd is deducted in lieu of personal expenses, the net income shall be Rs.2000/ per month, i.e. Rs.24000/ per year. Since the deceased was aged about 31 years, under Schedule2 of the Motor Vehicles Act, multiplier of 17 may be used and an amount of Rs.9,500/ may also be paid to the appellants in lieu of funeral expenses, loss of consortium and loss of estate as provided under Schedule2. Thus, the total compensation comes to Rs.4,17,500/. Accordingly, we assess the compensation to the tune of Rs.4,17,500/, out of which, an amount of Rs.50,000/ along with interest shall be deposited in interest bearing account in the name of Km. Preeti, Km. Kirti, Km. Rashmi and Master Deep who seem to be minor even today. The amount, so deposited shall be paid to them alongwith interest whenever they attain majority. The father of the deceased Shri Shiv Balak and mother Smt. Shanti Devi shall also be paid an amount of Rs.50,000/ each along with related interest. Rest of the amount shall be paid to the claimant Smt. Malti Devi. The claimants shall also be entitled interest at the rate of 10% per annum from the date of filing of the application before the tribunal. The tribunal shall calculate the compensation accordingly for payment to the claimants.

12. In view of above, the appeal is allowed. The award/order dated 2722003 is set aside. The Motor Accidents Claim Tribunal is directed to assess the compensation in the light of the observations, made in the present judgment forthwith and ensure the payment of compensation expeditiously and preferably

within a period of four months from the date of receipt of a certified copy of this order.

13. The appeal is accordingly allowed. Costs easy.

