
(1996) 03 MP CK 0081
In the Madhya Pradesh High Court
Case No : M.A. No. 277 of 1994 (G)

Mst. Baby and Others

APPELLANT

Vs

Sona Khan and Another

RESPONDENT

Date of Decision : 23-03-1996

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (1997) 1 MPJR 36

Hon'ble Judges : T.S. Doabia, J; S.K. Dubey, J

Bench : Division Bench

Advocate : K.K. Lahoti, for the Appellant; B.K. Dubey, for the Respondent

Final Decision : Allowed

Judgement

T.S. Doabia, J.

The claimants, in this appeal, preferred u/s 173 of the Motor Vehicles Act, 1988, are not satisfied with the quantum of compensation awarded by the Motor Accident Claims Tribunal. They seek enhancement. The amount determined by the Tribunal is said to have been paid to the appellants-claimants. No cross appeal or cross objections have been filed. The respondent New India Insurance Company has thus agreed to abide by the award. Even though no cross objection have been preferred to this appeal, learned counsel appearing for the Insurance Company has argued that this was a case where in fact no compensation could be awarded at all and he submitted that the question of enhancement would not arise. According to him, claimants are heirs of the driver of the ill fated Tempo. This tempo suffered an accident on account of it being not kept in proper running condition. The question raised is that the claimants could not claim any compensation under the Motor Vehicles Act, 1988 though they could have sought their remedy under the Workmen's Compensation Act, 1923. It is this issue which is also being examined in this appeal. Before doing so, facts in brief be noticed. One Sona Khan, respondent no. 1 is the owner of the Tempo No. CPJ 2975. Mustkim Khan whose heirs are the appellants herein, was the driver. This

tempo was on its way from Jora to Morena. At about 9.30 a.m. on 5th December, 1991 this tempo turned turtle. It fell on Mustkim Khan. He suffered several injuries and died before medical aid could be given to him.

The Motor Accident Claims Tribunal (for short "the Tribunal") has recorded the following findings.

(i) That Mustkim Khan died in an accident involving Tempo bearing No. CPJ 2975 on 5.12.1991.

(ii) That the accident did not take place on account of the negligence of the owner in if not keeping the tempo in Road worthy condition,

(iii) That the appellants/claimants are the heirs of Mustkim Khan,

(iv) That on account of the failure of the gullitie and rod fitted in the steering wheel the accident took place.

(v) The owner of the vehicle was remiss in keeping the tempo in road worthy condition and on account of this lapse on the part of the owner, heris of the driver are entitled to compensation.

(vi) The income of the driver was fixed at Rs. 1000/- per month. It was, however, recorded that he was contributing only 50 percent of the above amount to the family. The multiplier of 14 was applied and compensation was assessed at 84,000/-. The award is silent about loss of consortium.

Before considering the legal argument raised by the learned counsel for The Insurance Company, evidence regarding the condition of the vehicle and the circumstances under which the accident took place, be again noticed. The claimants in their claim application merely stated that the tempo in question was not maintained in proper condition and on account of serious mechanical fault, it turned turtle causing the death of the driver Mustkim Khan. The widow when appeared in the witness box made a statement to the effect that there was some defect in the steering of the tempo and that he (driver) had lodged the complaint with its owner. He was on his way to Morena with a view to leave the tempo with its owner. Rashid (P.W. 4) has also testified to the effect that the deceased Mustkim Khan told him that there is some defect in the steering of the tempo and he is going to leave the same with its owner. This witness was in the tempo on that date. He was unhurt. He stated that the deceased did tell to the owner of the tempo that he should get it repaired but the owner did not pay any heed to this. A suggestion was made to this witness that at the time of the accident the tempo was going at as speed of 60 of 70 km. per hour. The witness denied this suggestion. Atarsingh Tomar has appeared as P.W. 1. He is an employee of the Police Department attached with Motor Vehicle Branch. He has examined the tempo on 10.12.1991. He submitted his report (Ex. P. 4.) He found the rod (Gulli) keeping the steering wheel in position in broken condition. This, according to the witness, was the cause of the accident. Neither the owner has appeared in the witness box nor the Insurance Company led any evidence. On the basis of

the evidence brought on record it becomes apparent that the owner Sona Khan was apprised of some mechanical defect and he paid no need to get the tempo repaired. Thus on account of this negligence the deceased Mustkim Khan met with an accident and in this accident he lost his life.

The question which has been imposed by the learned counsel for the Insurance Company and which has been given serious consideration by us, is that whether in these circumstances, the heirs can claim compensation under the Motor Vehicles Act. The contention thus raised is that the heirs may have remedy under the Workmen's Compensation Act 1923 but they have none under the Motor Vehicles Act. The argument raised is that the Act of 1988 pre-supposes the use of vehicle and an accident involving negligence by the use of vehicle. The act of negligence, according to the learned counsel, should form the cause of the accident; as there was no negligence on the part of the driver, therefore, the claimants are not entitled to any compensation. The element of wrongful act which is said to be a basis of tortious act, according to the counsel, is absent and, therefore, the heirs are not entitled to any compensation.

The above aspect of the matter stands considered by the Kerala High Court and other High Courts also. There is a decision of the Supreme Court also which deals with some what similar situation. It would, therefore, be apt to refer to some of them.

In *Motor and General Finance (India) Ltd. v. Mary Mony* (1991 A.C.J. 101 Ker), the Division Bench was considering the meaning to be assigned to the words "arising out of the use of the motor vehicle" as occurring in section 110 (1) of the Motor Vehicles Act, 1939. The Division Bench of the Kerala High Court was of the view that the word "use" has been used in a wider sense to cover all engagements of the motor vehicle, including driving, parking, keeping, stationary, repairing, leaving unattended on the road or for any other purposes. It was observed that even in a case when a vehicle is being driven and is stopped or parked for being repaired, it cannot be said that the vehicle is not being used. The Division Bench referred to the decision reported in *General Manager, Karnataka State Road Transport Corporation v. S. Satalingappa* (1979 A.C.J. 452 (Kar)) and *V.G. Sumant v. Shailendra Kumar* (1980 ACJ 248 (MP)).

With regard to the persons who are entitled to claim compensation under the Motor Vehicles Act, reference may again be made to the another D.B. decision of the Kerala High Court in *United India Insurance Co. Ltd. v. Premakumaran* (1988 ACJ 597 (Ker)). The Division Bench was of the view that the provisions of the Motor Vehicles Act 1939 do not curtail the power of the Tribunal to direct the payment of compensation to the injured or the legal representative, legal heirs of the deceased by any person who caused the accident involving the use of the motor vehicle which resulted in the death of the injured or injuries to persons claiming compensation. In *Union of India v. Sushile Devi* (1990 ACJ. (All)), it was observed that for invoking the jurisdiction seeking the claim all that has to be established is that the claim should be in respect of the accident involving the

death of, or bodily injury to, persons caused or contributed by the use of motor vehicle whether wholly or conjointly with some third party. The Court also observed that when the word "third party" is used, it means other than the driver or owner.

The question was however directly considered again by the Kerala High Court in *Oriental Fire and Genl. Ins. Co. Ltd. and Another Vs. P.P. Misri and Others*, . In paragraph 31 of the judgment it has been observed as under:

It has to be noted that there is nothing under sections 110, 110-A, 110-B or 110-C of the Act which postulates that compensation can be awarded by the Claims Tribunal only when negligence on the part of the driver of the vehicle concerned is established. These sections deal with adjudication of compensation for the injury sustained by a person or compensation to be paid to the legal representatives or dependants of a deceased person, in an accident involving the use of the motor vehicle.

In paragraph 52 and 53 of the judgment, which are relevant, relevant portion thereof be noticed.

52 "The owner is liable to compensate the driver on the principle that he has failed to discharge a duty cast on him by law, and also on the principle that the owner is liable to the legal representatives of a deceased workman, if the workman dies in the course of employment not on account of his negligence.

The inference from the finding of the Tribunal is that the vehicle was not road worthy. The owner has got an obligation to put his vehicle on a public road only if it is road worthy. The evidence also indicates that the accident took place only on account of the bad condition of the vehicle and not on account of the negligence of the driver." Thus heirs of driver can maintain a claim petition under the Motor Vehicles Act.

Reference be made to the decision of the Supreme Court in *Minu B. Mehta and another v. Balkrishna Ramchandra Navan and another* (1977 ACJ 118). In the above case it has been laid down that in order to sustain a plea that the accident was due to the mechanical defect, the owner of the vehicle must prove that the mechanical defect was latent and not discoverable by the use of "The defect remained undiscovered despite the care, As the evidence had shown that something unusual had happened to cause this erosion, it was necessary for the defendants to show that they neither knew nor ought to have known of any unusual occurrence to cause the breakdown."

In the present case evidence has come on record that there was some defect in the vehicle and this has been pointed out to the owner. He had failed to rectify the same. It has also come on record that on account of the mechanical defect the accident occurred. If this be the position, the present appellants are entitled to claim the compensation and their application was rightly allowed by the Tribunal. Before parting with this aspect of the matter reference may also be

made to the decision reported in *Maina Devi v. Ram Prakash* (A.I.R. 1990 11. SC. 53) wherein it was held that burden of proof that the vehicle was in order is on the owner.

An argument was raised by learned counsel for the Insurance Company that vehicle was driven at the speed of 60 or 70 km per hour. The evidence of Rashid (P.W. 4) has been examined. His statement is to the contrary. A suggestion was given to him that the vehicle was being driven at the speed of 60 to 70 km. per hour; but he denied. Even otherwise the vehicle was on State Highway and speed of 60 km. per hour cannot be said to be excessive. The position might have been different had it been brought on record that the road was not reasonable care. Secondly the burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. The Supreme Court referred to the decision in *Henderson, v. Henry E. Jenkins & Sons* (1970 ACJ 1). On this case following observations were made-which are relevant.

In that case its lorry driver applied the brakes of the lorry on a steep hill but they failed to operate. As a result the lorry struck and killed a man who was emerging from a parked vehicle. The defence was that brake failure was due to a latent defect not discoverable by reasonable care on driver's part. It was found that the lorry was five years old and had done atleast 1,50,000/- miles. The brakes were hydraulically operated. It was also found after the accident that the brake failure was due to a steel pipe bursting from 7 mm. to 1 mm. The corrosion had occurred where it could not be seen except by removing the pipe completely from the vehicle and this had never been done. Expert evidence showed that it was not a normal precaution to do this if, as was the case, the visible parts of the pipe were not corroded. The corrosion was unusual and unexplained. An expert witness said it must have been due to chemical action of some kind such as exposure to salt from the roads in winter or on journeys near the sea. The House of Lords, held that the burden of proof which lay on the defendants to show that they had taken all reasonable care had been discharged, in a proper condition. As indicated above, neither the owner nor the Insurance Company brought any evidence on record and as such the finding recorded by the Tribunal that the accident took place on account of mechanical failure and that the owner was negligent in keeping the vehicle in an appropriate and road worthy condition is upheld.

Coming to the quantum of compensation some thing is required to be said in favour of the claimants. On the evidence brought on record a finding has been recorded that the deceased was earning a sum of Rs. 1000/- every month. The finding recorded that he was contributing only 50 percent to the family kitty cannot be accepted. His family consisted of widow and 5 others". He used to have morning meals in the house itself, which is apparent from the evidence of Mst. Baby (P.W. 3). She stated that after having his meals, he had taken over the

steering wheel. As such it would be just and proper to conclude that the deceased was contributing Rs. 700/- to the family, figure for the year would come to Rs. 8400/-. The age of the deceased is said to be 30 years and as such multiplier of 15 is applied. The compensation is fixed accordingly. This will come to Rs. 1,30,000/-. The appellant no. 1 would also be entitled to a sum of Rs. 10,000/- for loss of consortium. The total compensation would thus be Rs. 1,40,000/-. The appellants would also be entitled to interest on this enhanced amount at the rate of 12 percent per annum which would be payable from the date of the application. Respondent Insurance Company shall deposit the amount within a period of two months. The period of two months would begun from the date when copy of this order is made available. The claimants would be entitled to interest at the rate of 18 percent in case of default. The Tribunal would distribute the compensation as laid down by the Supreme Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others,

This appeal is allowed in the manner indicated above. The appellant would be entitled to costs. Counsel's fee Rs. 1000/-.