

(2011) 11 J&K CK 0006

In the Jammu And Kashmir High Court

Case No : CIMA No. 10 of 2001, CMP No. 219 of 2005 c/w CIMA No. 11 of 2001
CMP No. 220 of 2005 and CMP No. 11 of 2001

National Insurance Co. Ltd.

APPELLANT

Vs

Kulwant Singh and Others

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 166
Ranbir Penal Code, 1989 — Section 279, 304A

Citation : (2011) 4 JKJ 566

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, Judge

1. Gurdeep Singh son of Kulwant Singh resident of Dyala Chak, Batala, District Gurdaspur, employed in Indo-Tibetian Border Police (ITBP) died

on 29.09.1997 in a vehicular accident when Truck No. JKR/535 rashly and negligently driven by its Driver-Avtar Singh fell in deep gorge at

Merog, Ramban. The occurrence led to registration of case - FIR No. 56/1997 u/s 279/304-A RPC. The driver of the Truck also died in the

accident.

2. Kulwant Singh - father of deceased, his mother, widow and two minor children filed claim petition No. 26/claim on 25.10.1997 u/s 166/140,

Motor Vehicles Act before the Motor Accidents Claim Tribunal (MACT), Ramban.

3. The petitioners asked for compensation of Rs. 10,00,000/- from National Insurance Company, with which the offending Truck was insured as

also Shri Dayal Singh S/o Ajit Singh R/o Musa Chak Tehsil R.S. Pura - owner of

the offending vehicle.

4. Sh. Jhanda Singh - father of Sh. Avtar Singh, driver of the offending vehicle, his widow and his two minor children also filed claim petition No.

24/claim on 26.09.1997 against the National Insurance Company and owner of the vehicle. The petitioners claimed an amount of Rs. 20,00,000/-

as compensation from the respondents.

5. The claim petition filed by Kulwant Singh and ore (claim petition No. 26/claim) was opposed by Insurance Company on the grounds that as the

deceased was an unauthorized passenger in the offending vehicle, the Insurance Company was not liable to pay any compensation to the

petitioners. It is insisted that liability of Insurance Company under the Insurance policy is limited/restricted to the ambit and scope of insurance

policy. It was pleaded that the Insurance company may not be liable to pay any compensation in the event it was proved that the driver of

offending vehicle was not holding a valid and effective driving licence or that the offending vehicle at the time of accident was being plied in

contravention of route permit, fitness certificate or policy of the insurance. The Insurance company resisted the claim petition filed by Jhanda Singh

and ors. (claim petition No. 24/claim) on the ground that as the deceased was driver of the vehicle and was responsible for the accident, was not

bound to pay compensation to the dependents of deceased driver. It was pleaded that the deceased being himself tortfeasor, his dependents were

not entitled to recover any compensation from the Insurance company. It was further contended that as the deceased was a paid employee of Shri

Dayal Singh - respondent No. 2 in the petition, the deceased was a workman within the meaning of Workmen's Compensation Act and right

course for petitioners was to approach the Authority under Workmen's Compensation Act for award of compensation against the employer of

deceased. It was reiterated that liability of Insurance Company was restricted to the ambit and scope of insurance policy and not beyond the terms

of insurance contract. It was pleaded that the Insurance Company may be able to escape the liability to pay compensation to the petitioners in case

the driver is found to have not been holding valid and effective driving licence at the time of accident or the offending vehicle was found to have

been plied at the time accident in contravention of route permit, fitness

certificate and policy of insurance. The Tribunal on perusal of the pleadings in the aforementioned two claim petitions arising out of the same accident, settled the following issues:

Claim petition No. 26/claims

(i) Whether the death of Gurdeep Singh s/o Kulwant Singh ITBP Constable was caused on 10.09.1997 on National Highway at kilometer No.

156, because of use of motor vehicle No. 535-JKR which was plied by S. Avtar Singh driver who was under the employment of respondent No.

6 Daya Singh and vehicle was insured with National Insurance Company Ltd. and the driver has also died in the accident. O.P.P

(ii) On proof of issue No. 1, to what amount of compensation, the petitioners are entitled to and from whom and in what proportion? O.P.P

(iii) Whether Insurance Company is not liable to pay compensation as the deceased was unauthorized passenger in the offending vehicle/O.P.P.-I

(iv) Relief.

Claim petition No. 24/claims

(i) Whether the death of S. Avtar Singh S/o S. Jhanda Singh R/o Digyana Tehsil R.S. Pura, Jammu was caused on 10.09.1997 on NHW at

Kilometer No. 166 because of use of Motor Vehicle No. 535/JKR of which deceased was the driver and was under the employment of

respondent No. 2S. Daya Singh the vehicle was insured with National Insurance Co.Ltd? O.P.P

(ii) On proof of issue No. 1 to what amount of compensation, the petitioners are entitled to and from whom and in what proportion? O.P.P

(iii) Whether Insurance Company is liable to pay as deceased driver was himself tortfeasor? O.P.P.

(iv) Whether the petition is not maintainable as the petitioners ought to have approached the forum under the Workmens Compensation Act?

O.P.P-I

6. The claimants in both the claim petitions stepped in the witness box. However, the insurance company did not adduce any evidence either to

prove the issues, the burden whereof was put on the insurance company or to rebut the evidence adduced by the petitioners. The evidence was

accordingly closed on 6-7-1999. The Tribunal on perusal of the pleadings and evidence brought on the file, passed two separate Awards on 31-

10-2000.

7. In claim petition No. 26/Claims, the Tribunal rejected the contention of the Insurance company that it was not liable to pay any compensation,

as the deceased Gurdeep Singh, Constable, ITBP was an unauthorized/gratuitous passenger. The reliance was placed by the Tribunal on the law

laid down in New India Assurance Company Vs. Shri Satpal Singh and Others, . The Tribunal thereafter proceeded to assess the compensation

having regard to settled legal principles. The Tribunal awarded an amount of Rs. 4.00 Lacs with 12% interest from the date of filing of claim

petition till its final realization to be apportioned in equal shares between five claimants in the petition.

8. In claim petition No. 24/claims, the Tribunal rejected the case set up by the Insurance Company that as the deceased himself was tortfeasor, his

dependents were not entitled to maintain the claim. It was held that the Insurance Company had failed to prove that the deceased was the

tortfeasor and that the accident was not attributable to the act of God or mechanical defect in the offending vehicle. As regards, the necessity to fall

back on Workmen's Compensation Act instead of Motor Vehicles Act, the Tribunal held that the petitioners were well within their rights to

exercise the option and choose either of the remedy available under law to get compensation under Workmen's Compensation Act or the Motor

Vehicles Act. The Tribunal proceeded to assess the compensation payable to the petitioners at Rs. 3,12,500/- with 12% interest from the date of

filing of the claim till its final realization.

9. The Insurance Company has filed two appeals registered as CIMA Nos. 10/2001 and 11/2001 to assail the awards made in claim petition No.

26 and claim petition No. 24 respectively. The grounds urged in the memoranda of appeals are identical to the case set up by the appellant in

opposition to the claim petitions. It is reiterated that the appellant was not liable to pay any compensation to Kulwant Singh and others on account

of accidental death of Gurdeep Singh for the reasons that the deceased was an unauthorized/gratuitous passenger in the offending vehicle and not

covered by the premium paid by the owner of the vehicle. The appellant insists that as deceased Avtar Singh was himself responsible for the

vehicle accident and tortfeasor because of the negligence committed, his

dependents were stripped off any right to maintain the claim petition against the appellant. The next ground urged relates to liability of the owner of the vehicle to pay compensation to the petitioners under Workmen's Compensation Act. The common ground urged in both the appeals is that the Tribunal committed gross irregularity in disallowing the appellant's application for summoning the Licensing Authority or any official from its office to prove that the driver of offending vehicle was not holding a valid and effective driving license at the time of accident and thus, there is a breach of terms and conditions of the insurance policy on part of the owner of offending vehicle.

10. I have gone through the memoranda of appeals as also the record received from the Tribunal. I have heard learned counsel for the parties.

CIMA No. 10/2001

11. The appellant assails the award primarily on the ground that the deceased was unauthorized/gratuitous passenger in the offending vehicle at the time of accident. This plea appears to have been raised before the Tribunal. However, the Tribunal relying on the law laid down in *New India Assurance Co.Ltd. v. Sat Pal Singh* (2000 ACJ I 235) repelled the attack and held the plea to have become "non-issue" in the wake of aforesaid

judgment. The Supreme Court in *New India Assurance Company Ltd. v. Asha Rani and others*, 2003 (2) SCC 223 reversed judgment in *Sat*

Pal's case (Supra) relied upon by the Tribunal. The Court held that an insurer would not be liable to indemnify the owner of the vehicle on account

of death of a person travelling unauthorisedly in a vehicle because of the accident involving such vehicle. The law on the subject was reiterated in *National Insurance Company Ltd. v. Baljit Kour and others* (2004 (1) Supreme 3).

The Supreme Court held that instead and in place of insurer, owner of vehicle shall be liable to satisfy the award. The Court held that though the amendment of 1994 made the insurer liable to pay

compensation on behalf of the owner of the vehicle to the owner of the goods carried in the vehicle at the time of accident or his authorized

representative, yet the amendment did not make room for the liability of insurer with respect to the passenger, especially gratuitous passenger who

were neither contemplated at the time of contract of the insurance nor any premium was paid to the extent of the benefit of insurance to such

category of people. However, the law laid down in Baljit Kour's case (supra), in view of legal proposition prevailing in wake of Sat Pal's case, was

made prospective. The Court after laying down the law on the subject of liability of insurer to pay compensation to a gratuitous passenger or his

LRs, proceeded to observe:

The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and

equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect

12. In view of the aforestated legal position, the law as regards gratuitous passenger cannot be applied in the present case inasmuch as the accident

took place and the award was made much before the judgment in Ashar Rani and Baljit Kour's cases. The appellant's case that the appellant was

prevented from establishing statutory defence available u/s 149(2), Motor Vehicles Act by the Tribunal as his application for summoning the

officer/official of the licensing authority and prove that the driver of offending vehicle was not holding an effective and valid driving licence at the

time of accident was disallowed and that the award was to be set aside on this ground, does not sound convincing. It is pertinent to point out that

the appellant filed an application for summoning the Record Keeper of the Licensing Authority, Amritsar (Pb) on 14-12-1999. The claim petitions

were filed on 25-10-1997 and 26.10.1997. The claimants concluded their evidence on 29-12-1998. The appellant's evidence was closed on 6-7-

1999. The appellant, a few months after its evidence was closed, came up with application for summoning the Record Keeper of Licensing

Authority, Amritsar (Pb).

13. It needs to be recalled that the appellant in his objections to the claim petition did not take a definite stand that the driver of offending vehicle

was not holding valid and effective driving licence at the time of accident. The plea raised by the appellant, on the other hand, was more in the

nature of an opinion of the appellant that it may escape the liability to pay compensation, if it was proved that the driver of offending vehicle was

not holding valid and effective driving licence at the time of accident. The Tribunal in the said background and also noticing that the record available

on the file indicated that the driver of the offending vehicle was holding valid and

effective driving licence issued by the licensing authority under DL

No. 13675 dated 5-5-1989, renewed upto 2.2.1998, rejected the belated prayer made by the appellant for summoning the witnesses. Against the

said backdrop, the refusal by the Tribunal to summon the record from the licensing authority, when claim petition was listed for final argument,

cannot be held to make the award impugned in the appeal, liable to be set aside. The ground urged in the appeal that the respondents having failed

to prove that the accident in question was attributable to the rash and negligent driving of the Driver (Late Avtar Singh) of the offending vehicle, the

Tribunal, in view of the mandate of Section 166 of the Act, was not justified in passing the award, is equally devoid of any substance.

14. The accident took place on the NHW 1-A at 156 KM near Merog, Ramban. The claimants in two claim petitions were not present at the time

of accident and cannot be presumed to have any personal knowledge as regards circumstances in which the accident took place. In the said

background, the claimants cannot be said to have withheld any evidence relating to the circumstances in which the accident took place, from the

Tribunal. In such a situation, the Tribunal has to rely on the outcome of investigation, if any conducted by the local police. In the present case, the

final police report No. 17 of 1997 indicated that the driver of offending vehicle was driving the vehicle rashly and negligently; that the offending

vehicle turned turtle and fell down in a deep gorge. The Tribunal in such eventuality is to act on the principle of *res ipsa loquitur* and with the help of

investigation report, arrive at just conclusion. In the present case, there was sufficient evidence before the Tribunal to conclude that the accident

was caused due to rash and negligent driving by Late Shri Avtar Singh, driver of the offending vehicle. The appellant does not appear to have

sought permission for raising defence/plea in opposition to the claim petition, not contemplated by section 149(2), Motor Vehicles Act and

otherwise available to the insured. In the circumstances, feeble effort made by appellant to question the award on the basis of quantum of

compensation, cannot succeed.

CIMA No. 11/2001

15. The respondents admittedly laid a petition in terms of Section 166, Motor Vehicles Act 1988, though respondents had an option to fall back

on Workmen's Compensation Act, 1923 to claim compensation from the appellant. Even if respondents did not in the body of claim petition say in so many words that the accident that claimed life of Shri Avtar Singh - Driver of offending vehicle, was attributable to his rash and negligent driving, yet their reliance on case - FIR No. 56/1997 u/s 279, 304A RPC, made it clear that the accident was direct result of rash and negligent driving of offending vehicle by the deceased. It has been held in Oriental Insurance Company Limited v. Premlata Shukla (2007 (5) SC 307) and the principle of law reiterated in National Insurance Co. Ltd. Vs. Rattani and Others, that once a document is relied upon in support of the claim petition, the claimants cannot be heard insisting on its selective reliance on such document. The respondents, in the present case, relied on copy of FIR No. 56/1997, to prove factum of accident. They cannot be heard contending that reliance on FIR be restricted to factum of accident and death of Shri Avtar Singh and not the cause of such accident, which plain reading of FIR suggests was rash and negligent driving of the offending vehicle at the time of accident by the deceased. It is well settled law that a claim petition u/s 166, Motor Vehicles Act is an action in tort and the legal representatives of deceased have to establish by preponderance of probabilities that there was no negligence on the part of deceased and that the deceased was not responsible for the accident that claimed his life. Once the record available on the file establishes that the deceased himself was a tortfeasor, his dependents cannot maintain a claim petition u/s 166, Motor Vehicles Act 1988 and seek compensation from the owner of the vehicle or insurance company that under the insurance policy is under a contractual obligation to indemnify the owner. The reason for said legal proposition is not difficult to infer. The dependents of tortfeasor cannot be allowed to reap the fruits of an actionable wrong that is attributable to the person, under whom they claim. However, law in such a case does not shut all doors on the dependents, to claim compensation. The dependents of deceased can maintain a claim for compensation under Workmen's Compensation Act, 1923. In a petition under Workmen's Compensation Act, the legal heirs of deceased workman have not to establish negligence as a precondition for award of compensation. In other words, the question whether any negligence was attributable to deceased is not relevant at all in a claim petition under Workmen's Compensation

Act, 1923. What is of pivotal importance in case of a claim petition u/s 3, Workmen's Compensation Act, is that injury is caused by an accident, arising out of and in the course of employment of workman. Once it is proved that the injury has been so caused in the course of employment of workman, all other matters relating to the accident recede to background, unless, of course the case falls within ambit of Proviso to Section 3, Workmen's Compensation Act. So viewed, in the present case respondents would have been within their rights to maintain the claim petition under Workmen's Compensation Act.

16. The other course available to respondents was to claim compensation u/s 163-A, Motor Vehicles Act, 1988. In terms of Section 163-A(2) of the Act in any claim for compensation laid u/s 163-A(1) of the Act, the claimant is not required to plead or establish that the death in respect of which claim has been made, was due to any wrongful act or neglect or default of the owner of the vehicles or of any other person. However, in such case compensation awarded, is to be in strict accordance with Second Schedule to the Motor Vehicles Act.

17. In the case in hand, as already pointed out, the respondents have neither filed a claim under Workmen's Compensation Act nor pressed into service Section 163-A, Motor Vehicles Act. The claim petition is u/s 166, Motor Vehicles Act, and ought to have been held to be not maintainable, giving liberty to respondents to fall back on Section 163-A, Motor Vehicles Act. The Tribunal could have suo moto treated the claim petition as one u/s 163-A, Motor Vehicles Act and proceeded with the matter. It hardly needs to be emphasised that there must be a visible element of compassion, in the mode and manner in which a claim petition under Motor Vehicles Act is dealt with. The Tribunal has to realise that the claimants before it are left high and dry by a tragic incident that they could not foresee so as to make arrangements well in advance for their sustenance in absence of their sole breadwinner. It is in the said background that the rules of pleadings and proof are held not to apply with some strictness in case of claim petitions as these are to apply in ordinary civil suits. In the present case the compassion on the part of Tribunal was not necessary as the witness brought on record that respondent No. 1 was an old and ailing man and had lost his eyesight. The Tribunal instead has

gone ahead to try the matter and pass the Award. The objection raised to the maintainability of claim petition has been rejected in cursory manner

by the Tribunal, holding it to be maintainable in view of option available to respondents u/s 167, Motor Vehicles Act, 1988. It was least realised by

the Tribunal that claim petition filed by respondent, was to satisfy the requirements of Section 166, Motor Vehicles Act, apart from its

permissibility u/s 167 of the Act.

18. The vehicular accident in question has occurred about 14 years back. The award impugned in the appeal, was passed on 31st October 2001.

The respondents belong to disempowered, downtrodden, marginalised and unattended section of society. The course open to this Court against

the above backdrop must be guided not by technicalities but by the pitiable situation that confronts the respondents. It is nobody's case that

respondents are not entitled to recover compensation from the appellant. The dispute relates to the remedy adopted by respondents to get the

compensation. The respondents, as already stated, could very well maintain petition u/s 3 and/or 4, Workmen's Compensation Act, 1923 or at

their option such a petition u/s 163-A, Motor Vehicles Act. If the respondents, because of non-availability of proper legal assistance, have pushed

a wrong button, they cannot be deprived of the compensation that has legitimately come their way though through a remedy not available under

law. The Tribunal, as already indicated, has awarded an amount of Rs. 3,12,500/- to respondents. Had the respondents instead filed a claim

petition under Workmen's Compensation Act, the compensation available in terms of Section 4(1)(a) read with Explanation 1 & II and Schedule

IV, a little more than what has been awarded would have been worked out-taking Rs. 4,000/- as monthly wages received by deceased, and

multiplying 50% of the monthly wages by 213.57, i.e. ""relevant factor"" applicable in the present case. The position would have been same had the

respondents filed a claim petition u/s 163-A, Motor Vehicles Act.

19. Viewed thus, it would be in the interests of justice not to interfere with the Award rendered by Motor Accident Claims Tribunal more than 14

years back and relegate the respondents to the position as on the date of accident, forcing them to commence afresh proceedings for recovery of

the compensation.

20. In the circumstances and for the reasons discussed both the appeals - CIMA No. 10/2001 and CIMA No. 11/2001 are dismissed.

21. Interim direction, if any, shall stand vacated. Record be sent down.