

(2009) 01 SHI CK 0020
In the High Court Of Himachal Pradesh

National Insurance Company and Hari Gopal	APPELLANT
Vs	
Maghi Ram and Others	RESPONDENT

Date of Decision : 08-01-2009

Acts Referred:

Constitution of India, 1950 — Article 142

Citation : (2010) ACJ 2096 : (2009) 1 ShimLC 454

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Judgement

Deepak Gupta, J.—These two appeals are being disposed of by a common judgment since they arise out of one Award passed by the learned Motor Accident Claims Tribunal (II), Shimla on 20.4.2005 in MAC Petition No. 17-S/2 of 2001. Maghi Ram, hereinafter referred to as the claimant, was travelling in a truck No. HP07-4227 owned by Shri Hari Gopal, hereinafter referred to as the owner, on May, 3, 2000. The truck met with an accident. The claimant filed a claim petition in which he alleged that the accident had occurred due to the rash and negligent driving of the driver. According to the claimant he sustained multiple grievous injuries including fracture of left femur and left wrist. He also alleged that he had hired the truck for bringing empty apple wooden crates from Kalka. The owner and driver admitted the accident but denied that the same had occurred due to the rash and negligent driving of the truck driver. The owner and driver of the truck who had filed a joint written statement denied the allegation that the truck had been hired by the claimant. The National Insurance Company with which the vehicle was insured amongst other pleas also raised a plea that the claimant was not an authorized passenger and that he was travelling in the truck as a gratuitous passenger and therefore, the Insurance Company is not liable to pay any compensation. The learned Tribunal came to the conclusion that the claimant was entitled to compensation of Rs. 2,07,257/- along with interest @ of 9% per annum from the date of filing of the claim petition. The learned Tribunal also came to the conclusion that the claimant was not travelling in the truck as a hirer thereof. The learned Tribunal accordingly held that the Insurance

Company was not liable to reimburse the owner but directed that the Insurance Company should satisfy the award and it would be entitled to recover the same from the owner. Aggrieved against this award, FAO No. 298 of 2005 has been by the Insurance Company. The plea of the Insurance Company is that once it was held that the Insurance Company was not liable, the insurer could not have been directed to satisfy the award.

2. The owner of the vehicle Hari Gopal has filed an appeal being FAO No. 302 of 2005 and in this appeal it is alleged that the liability should be fastened on the Insurance Company. It is also urged that the amount of compensation awarded is excessive.

3. The claimant appeared as a witness as PW3. According to him, he had hired the truck. His version is that on 3.5.2000, he was going in the truck from Kotkhai to Kalka to get empty wooden crates for apples. He also states that he has engaged in the business of purchase and sale of wooden crates for packing apples and purchases these wooden crates from Kalka to sell them in Kotkhai and the surroundings villages. In cross-examination by the Insurance Company, he admitted that normally whenever, he buys the empty wooden crates at Kalka, he transported the same in truck(s) hired from Kalka itself. He, however, volunteered that on that date, he had hired the truck from Kotkhai and he admits that at the time of accident, the truck was empty. Though he has not made any statement in the examination-in-chief about the payment of any amount, in cross-examination, he states that he hired the truck for Rs. 5000/-. He later stated that he was to pay Rs. 5000/- in cash for hiring of the truck. According to him, he settled the hire charges with the truck driver. The truck in question was registered with the Kotkhai Truck Operations Union. He states that no slip was taken from the union. According to him, before this date, he had never hired any truck from the union. He admits that in ordinary course, the union issues a slip in respect of the trucks hired through the union.

4. PW5 is the office Secretary of the Kotkhai Truck Operators Union. He states that he knows the claimant who deals in the sale and purchase of empty wooden apple crates. According to him, on a number of occasions, the claimant had hired the truck(s) through the union and sometimes he used to get the truck(s) from Kalka and Parwanoo. He further states that on an average in every apple season, the claimant used to hire 4 - 5 trucks through the union. In cross-examination by the Insurance Company, he states that when any empty truck is taken from the union then no entry is made. According to him, the entry is only made if the truck is loaded at Kotkhai. According to his version, the union does not charge any amount from any truck which goes unloaded. This witness has not brought any record of 3.5.2000 i.e. the date of accident and he was making the statement on the basis of his memory.

5. The owner of the truck appeared as RW1. He states that the truck was hired by the claimant for bringing back empty wooden crates from Kalka. In cross-examination, he admits that no talk of hiring of the truck took place in his

presence. He also admits that whenever a truck is hired then entry is made in the union. According to him, he had checked the record of the union as to who had hired the truck on the date of the accident. He admits that when the truck is hired through the union, a slip is issued but he could not produce any such slip. He admits that log-book of the truck is maintained and the driver makes entries in the log-book but he did not produce the log book also.

6. From the pleadings and the evidence discussed above, it is apparent that in the joint written statement filed by the owner and driver, they had specifically denied the plea of the claimant that he had hired the truck. The owner in his statement admits that the claimant had not hired the truck in his presence. Even the claimant states that he had only talked with the driver about the hiring of the truck. However, the driver has not been examined. According to the owner, the record of the hiring of the truck is available with the union but according to PW5 who is the Secretary of the union no such record is available since no entry is made when empty truck is hired.

7. The statement of PW5 is apparently a false statement. This Court can take judicial notice of the fact that whenever truck is hired through the Truck Operators Union, an entry is bound to be made. This is because the unions have been formed to ensure that all the truck owners get their client(s) in turn. The statement of PW5 is contrary to the statement of the owner of the truck. In any event no record had been produced to show that the truck was hired. The statement of this witness is also contrary to that of the claimant. According to this witness, the claimant had hired trucks through the Union on a number of occasions. However, the claimant has categorically stated that he never hired a truck through the Union.

8. This Court in FAO 386 of 2001, titled National Insurance Company Ltd. v. Hans Raj and Ors. decided on 19.10.2005, had rejected the claim where the truck was hired to carry mangoes for sale from Dehra to Delhi. After the owner of the mangoes had sold the same at Delhi, he was returning in the same truck which met with an accident. It was held that he cannot be said to be the owner of the goods.

9. It is important to note that under the Motor Vehicles Act, 1988 as amended from 1994, the Insurance Company is liable in respect of death or bodily injury to any person including the owner of the goods or his authorized representative carried in the vehicle. The legislature in its wisdom has not used the words "hirer of the goods" but has used the words "owner of the goods" carried in the vehicle. Therefore, it is apparent that the goods must normally be carried in the vehicle. In the present case, the story of the claimant does not appear to be true. It cannot be believed that even before buying apple crates, a person would hire a truck to pick up the apple crates. There is no evidence on record that the claimant had already purchased the wooden crates from some party. As already mentioned above, even the truck driver was not examined. Therefore, I am of the considered view that the claimant/injured was not the owner of the goods

but only a gratuitous passenger in the truck.

10. As far as the quantum of compensation is concerned, it stands proved on record that the claimant was initially admitted on 3.5.2000 at Zonal Hospital, Shimla. He suffered fracture of his left femur and left wrist. On 6.5.2000, the claimant was referred to IGMC, Shimla where he was operated upon on 22.5.2000. Disability certificate Ex.PW1/B was issued in favour of the claimant which shows that he has been disabled to the extent of 20%. The learned Tribunal has taken the annual income of the insured at Rs. 36,000/- per annum and the future loss of earning has been worked out at Rs. 7,200/- per annum and applying the multiplier of 18, the compensation of Rs. 1, 29,600/- on this count has been worked out. The claimant has also been held entitled to Rs. 17,656.51 paise for expenses incurred on treatment and a sum of Rs. 40,000/- for pain and sufferings and Rs. 20,000/- for disability. This award is just and reasonable and calls for no interference.

11. It has been urged by Shri Deepak Bhasin, learned Counsel for the Insurance Company that the learned Tribunal should not have held the Insurance Company liable to satisfy the award. He has relied upon the judgment of the apex Court in National Insurance Company Ltd. v. Kaushalya Devi and Ors. 2008 (8) Scale 500 . This case arose out of a judgment delivered by this Court. Though the Insurance Company was exonerated, this Court, following the decision of the Apex Court in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, , had directed the Insurance Company to satisfy the award and recover the amount from the insurer. However, the apex Court set aside this portion of the judgment and gave the following directions:

14. For the reasons aforementioned, Civil Appeal arising out of SLP(C) No. 10694 is allowed and Civil Appeal arising out of SLP (C) No. 9910 of 2006 is dismissed. If the amount deposited by the insurance company has since been withdrawn by the first respondent, it would be open to the insurance company to recover the same in the manner specified by the High Court. But if the same has not been withdrawn the deposited amount may be refunded to the insurance company and the proceedings for realization of the amount may be initiated against the owner of the vehicle. In the facts and circumstances of the case, however, there shall be no order as to costs.

12. In National Insurance Co. Ltd. Vs. Baljit Kaur and Others, , a three Judge Bench of the Apex Court held that the words "any person" in Section 147 could be held not to include the owner of the goods or his authorized representative". It was further held that after the amendment of the Motor Vehicles Act in 1994, the Insurance Company is also liable in respect of the owner of the goods. However, the Court went on to hold that this judgment would have prospective effect since the Apex Court in New India Assurance Company Vs. Shri Satpal Singh and Others, had taken a different view which view had been set aside only in the year in 2000 in National Insurance Company v. Asha Rani (2003) 2 SCC 223 . Therefore, the apex Court directed the Insurance company to satisfy the

award and to recover the same from the owner without having to file a separate suit. Reliance on behalf of the claimant as well as the owner has also been placed on the judgment of the apex Court in Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd., wherein after holding that the Insurance Company was not liable, the Court directed the Insurance Company to deposit the amount. In my view this judgment cannot apply since in this case, the apex Court exercised its extra-ordinary jurisdiction under Article 142 of the Constitution to give these directions. This Court does not have any such jurisdiction. It would, however, be relevant to refer to another later judgment of the apex Court in Oriental Insurance Co. Ltd. Vs. Zaharulnisha and Others, , wherein the apex Court after holding that the Insurance Company is not liable directed to satisfy the award. Para 19 of the judgment reads as follows:

19. In the result, the appeal is allowed to the limited extent and it is directed that the appellant _ insurance company though not liable to pay the amount of compensation, but in the nature of this case it shall satisfy the award and shall have the right to recover the amount deposited by it along with interest from the owner of the vehicle, viz. respondent No. 8, particularly in view of the fact that no appeal was preferred by him nor has he chosen to appear before this Court to contest this appeal. This direction is given in the light of the judgments of this Court in National Insurance Co. Ltd. Vs. Baljit Kaur and Others, and Deddappa and Others Vs. The Branch Manager, National Insurance Co. Ltd.,

13. The apex Court in United India Insurance Co. Ltd. Vs. Suresh K.K. and Another, after holding that the Insurance Company was not liable, gave the following directions:

16. Keeping in view the aforementioned facts and circumstances into consideration, we are of the opinion that with a view to do complete justice between the parties, a direction should be given to the appellant to pay the amount to the claimant and realise the same from the owner of the vehicle. Such a direction would, in our opinion, serve the ends of justice.

17. We are passing this order also in view of the fact that the appellant has already deposited the amount pursuant to a direction issued by this Court dated 13.11.06.

14. On the basis of the aforesaid judgments, it has been alleged that this Court should also give similar directions to the Insurance Company. As noted above, in Deddappa's case (supra), the apex Court gave the directions in exercise of the jurisdiction vested in it under Article 142 of the Constitution. In Zaharulnisha's case (supra), this Court specifically followed this case. Therefore, it cannot be said that in Zaharulnisha's case also, the orders were passed by the apex Court in exercise of the jurisdiction vested in it by Article 142 of the Constitution of India. In Suresh's case (supra), though the apex Court has not specifically referred to Article 142, it is apparent that the directions have been given in the facts peculiar to that case.

15. On the other hand, in Kaushalya Devi's case (supra), the apex Court has set aside the directions given by this Court directing the Insurance Company to deposit the amount. It specifically held that if the amount had not been withdrawn by the Insurance Company, it would be refunded to the Company and the claimant would recover the amount from the owner of the vehicle. This is the latest judgment cited before me and I am bound by the same.

16. In view of the above discussion, the appeal filed by the owner is dismissed but the appeal filed by the Insurance Company is allowed. It is held that the Insurance Company is not liable to satisfy the award. However, in the interest of justice, if any portion of the amount deposited by the Insurance Company has been paid/released in favour of the claimant, the Insurance Company shall recover the same from the owner and not from the claimant. The claimant can recover the amount due to him from the owner.

17. Both the appeals are disposed of in the aforesaid terms. No costs.