
(2015) 02 P&H CK 0367

In the Punjab And Haryana At Chandigarh

Case No : FAO No. 5142 of 2013 (O & M)

National Insurance Company Limited

APPELLANT

Vs

Babloo and Others

RESPONDENT

Date of Decision : 16-02-2015

Acts Referred:

Motor Vehicles Act, 1988 — Section 158(6), 163A, 163-A, 166, 166(4)
Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (2015) 178 PLR 850

Hon'ble Judges : Jaspal Singh, J

Bench : Single Bench

Advocate : D.P. Gupta, for the Appellant; Vivek Lamba, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Jaspal Singh, J.—National Insurance Company Limited (for short, "Insurance Company") has preferred the instant appeal feeling dissatisfied against Award dated August 16, 2013 passed by Motor Accident Claims Tribunal, Chandigarh (for brevity, "Tribunal") in MACT Petition No. 22 of January 13, 2012 whereby a petition preferred by respondent No. 1 - Babloo under Section 166 of the Motor Vehicles Act 1988 (for short, "Act") was allowed and an award for Rs. 6,73,000/- was passed in favour of claimant and against owner/driver and Insurance Company making them jointly and severally liable to pay amount of compensation.

2. Briefly stated, facts contained in claim petition are that on December 20, 2011, his brother Vir Singh was working on Paonta Sahib - Dholakua Road as labourer under Raj Kumar, Contractor. At about 9:30 AM, one white Maruti car bearing No. HP-17A-3334 came at high speed without obeying traffic rules and struck against Vir Singh. As a result of impact of accident, Vir Singh sustained injuries and fell unconscious. He was immediately rushed to Civil Hospital, Paonta Sahib but his condition being serious, he was referred to PGI Chandigarh. He

could not survive and ultimately succumbed to his injuries on December 26, 2011. It has been further alleged that death of Vir Singh has occurred due to sustaining of injuries while driving Maruti car by owner/driver - Sudhir Kumar, in a rash and negligent manner.

3. It has further been averred in claim petition that Vir Singh was aged about 25 years and he was earning Rs. 12,000/- per month at the time of his sudden demise due to accident. A criminal case bearing FIR No. 400 dated December 20, 2011 under Sections 279, 337, 304A IPC was registered in connection with accident at Police Station, Paonta Sahib, District Sirmour (HP). Vir Singh was only bread winner in family and claimant being a physically challenged person having 75% permanent disability as he suffered from Polio, was fully dependent upon Vir Singh, who is otherwise unable to do any work to earn his livelihood.

4. Upon notice, claim petition was resisted by both the respondents. Respondent No. 1, owner/driver filed written statement taking preliminary objections that since no accident has taken place involving his car, claim petition is not maintainable, and that, claimant has no right or locus standi to file claim petition. On merits, all averments made in claim petition have been denied alleging the same to be wrong. Accordingly, he prayed for dismissal of the claim petition.

5. Respondent No. 2 - Insurance Company filed its separate written statement taking preliminary objections that driver/insured was not possessing a valid and effective driving license at the time of alleged accident; that learned Tribunal has got no territorial jurisdiction to try this petition; that no accident took place in District Sirmour (HP); that respondent No. 1 was not resident of Chandigarh as per contents of insurance policy; that claim petition is bad for non-joinder and mis-joinder of necessary parties as legal heirs of deceased have not been impleaded as parties to claim petition; and that claim petition is not maintainable as deceased was covered under Employees State Insurance Act as well as Workmen's Compensation Act. On merits, all averments made in the petition have been denied. Insurance Company, accordingly, prayed for dismissal of claim petition.

6. On going through pleadings of parties, following issues were framed by learned Tribunal to settle the matter in controversy between parties:--

"1. Whether deceased Vir Singh died as a result of injuries suffered in motor vehicle accident, which was caused due to rash and negligent driving of vehicle No. HP-17-A-3334, which was being driven by respondent No. 1? OPP

2. Whether the claimant is entitled to compensation on account of death of deceased Vir Singh in a motor vehicle accident? OPR

3. Whether the respondent No. 1 was not having a valid driving licence at the time of accident? OPR

4. Relief."

7. Both the parties were afforded opportunity to lead evidence in support of their claim, who adduced oral as well as documentary evidence. Claimant himself stepped into witness box as PW-1 and has reproduced the contents contained in claim petition preferred by him, and thereafter, he closed evidence. On the other hand, respondent No. 1 tendered into evidence photocopy of driving license Ex. R1, photocopy of registration certificate Ex. R2 and photocopy of insurance policy Ex. R3. Thereafter he closed his evidence. Respondent No. 2 - Insurance Company closed evidence without adducing any oral or documentary evidence.

8. After hearing learned counsel for parties, analyzing evidence adduced by parties in support of their respective claim and bestowing consideration, learned Tribunal allowed the claim petition as fully reflected in Para 1 of this judgment.

9. Feeling aggrieved, Insurance Company has preferred the instant appeal. Notice to respondent No. 1 was issued who is being represented by Mr. Vivek Lamba, Advocate.

10. While assailing findings recorded by learned Tribunal, especially, on issue No. 1, it has been argued with vehemence by learned counsel for appellant - Insurance Company that findings recorded by learned Tribunal are absolutely against evidence available on file and settled canons of law. Infact, there is no evidence to establish that accident occurred due to rash and negligent driving of Maruti Car No. HP-17A-3334 by respondent No. 2, in which, Vir Singh lost his life. Claimant did not examine even a single eye witness to prove involvement of vehicle in question as well as the fact that it was being driven by respondent No. 2 at the time of accident. Respondents, in their written statement, have categorically denied accident. Only claimant appeared in witness box and he also admitted that he did not witness the accident. Learned Tribunal has gravely erred while relying upon contents of FIR, especially, in view of fact that it is well settled that FIR cannot be treated as a substantive evidence in the absence of examination of author thereof as a witness by affording opportunity to other party to cross examine him. Even author of original FIR unfolded number of vehicle on the basis of information gathered from some other person. Thus, even version of author of FIR is based upon here-say evidence. As per Section 166(4) of the Act, report submitted by police under Section 158(6) of the Act is to be treated as an application for compensation and learned Tribunal is obliged to decide the issues on the basis of evidence produced by parties before it. Infact, learned Tribunal has wrongly drawn an adverse inference against driver on account of his non-appearance in witness box. Infact, there was nothing for driver to rebut in the absence of any eye witness of accident. So, findings recorded by learned Tribunal on issue No. 1 are not sustainable in the eyes of law and deserve to be reversed, and in view of reversal of findings, claim petition is liable to dismissed in toto.

11. On the other hand, learned counsel for respondent No. 1 - claimant has controverted the submissions made by learned counsel for Insurance Company contending that amount of compensation awarded on account of death of Vir

Singh is rather on lower side and deserves to be enhanced. There is no infirmity, illegality or impropriety in award passed by learned Tribunal.

12. After having heard learned counsel for parties, analyzing evidence and bestowing consideration to impugned award, this Court is of the considered view that findings recorded by learned Tribunal are against evidence available on file and settled legal proposition of law, and as such, are not sustainable in the eyes of law.

13. Undeniably, claim petition has been preferred under Section 166 of the Act by brother of deceased and claimant is obliged to prove by way of cogent and convincing evidence that death of his brother Vir Singh has occurred due to rash and negligent driving of Maruti Car No. HP-17A-3334. But, to utter surprise, claimant did not examine either author of FIR or any other eye witness of accident. It is an undisputed fact that claimant was not present at the time and place of accident. FIR, Ex. C1, is also based upon here-say evidence as registration number of vehicle was allegedly disclosed to its author by somebody else. Thus, before delving deep into the matter in controversy and to decide instant appeal on merits, it would be desirable to consider legal position in this regard, highlighted by Hon"ble Apex Court in recent judgments captioned as The Oriental Insurance Company Limited Vs. Meena Variyal and Others, (2007) ACJ 1284 : AIR 2007 SC 1609 : (2007) 137 CompCas 116 : (2007) 5 JT 65 : (2007) 5 SCALE 269 : (2007) 5 SCC 428 : (2007) 4 SCR 641 and Surender Kumar Arora and another Vs. Dr. Manoj Bisla and Others, (2012) ACJ 1305 : AIR 2013 SC 1918 : (2012) 4 SCC 552 : (2012) 3 TAC 353 .

14. In Meena Variyal's case (supra), material discussions and observations are contained in Paras 23 to 25 which are relevant and a benefit can be derived therefrom for adjudication of controversy in this case. Para Nos. 23 to 25 read as under:--

"23. Learned counsel for the respondent contended that there was no obligation on the claimant to prove negligence on the part of the driver. Learned counsel relied on Gujarat State Road Transport Corporation, Ahmedabad Vs. Ramanbhai Prabhatbhai and Another, (1987) ACJ 561 : AIR 1987 SC 1690 : (1987) 62 CompCas 609 : (1987) 2 JT 384 : (1987) 1 SCALE 1027 : (1987) 3 SCC 234 : (1987) 3 SCR 404 in support. In that decision, this Court clarified that the observations in Minu B. Mehta's case (supra) are in the nature of obiter dicta. But, this Court only proceeded to notice that departures had been made from the law of strict liability and the Fatal Accidents Act by introduction of Chapter VIIA of the 1939 Act and the introduction of Section 92A providing for compensation and the expansion of the provision as to who could make a claim, noticing that the application under Section 110A of the Act had to be made on behalf of or for the benefit of all the legal representatives of the deceased. This Court has not stated that on a claim based on negligence there is no obligation to establish negligence. This Court was dealing with no fault liability and the departure made from the Fatal Accidents Act and the theory of strict liability in the scheme of the

Act of 1939 as amended. This Court did not have the occasion to construe a provision like Section 163A of the Act of 1988 providing for compensation without proof of negligence in contradistinction to Section 166 of the Act. We may notice that Minu B. Mehta's case was decided by three learned Judges and the Gujarat State Road Transport Corporation case was decided only by two learned Judges. An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority. On a careful understanding of the decision in Gujarat State Road Transport Corporation (*supra*) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (*supra*) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.

24. We think that the law laid down in Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr. (*supra*) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under Sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependents to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.

25. In Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, (1977) ACJ 343 : AIR 1977 SC 1735 : (1977) 2 SCC

745 : (1977) 3 SCR 372 , two of the learned judges who constituted the Bench in *Minu B. Mehta* (supra) held that when a car is driven by the owner's employee on owner's business, the normal rule was that it was for the claimant for compensation to prove negligence. When the Manager of the owner while driving the car on the business of the owner took in a passenger, it would be taken that he had the authority to do so, considering his position unless otherwise shown. If due to his negligent driving an accident occurred and the passenger died, the owner would be liable for compensation. The court noticed that the modern trend was to make the master liable for acts of his servant which may not fall within the expression "in the course of his employment" as formerly understood. With respect, we think that the extensions to the principle of liability has been rightly indicated in this decision."

15. Similarly, in another case *Surender Kumar Arora* (supra), while referring previous decisions in case *Smt. Kaushnuma Begum and Others Vs. The New India Assurance Co. Ltd. and Others*, (2001) 1 ACC 152 : (2001) ACJ 428 : AIR 2001 SC 485 : (2001) 1 JT 375 : (2001) 1 SCALE 1 : (2001) 2 SCC 9 : (2001) 1 SCR 8 : (2001) 1 UJ 464 : (2001) AIRSCW 85 : (2001) 1 Supreme 5 and *Oriental Insurance Company Limited's* case (supra), following observations were made by Hon"ble Apex Court in Para Nos. 9 to 11:--

"9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No. 1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. May be, in order to help respondent No. 1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of *Kaushnuma Begum* (Smt.) and others (supra) would have come to the assistance of the claimants.

10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of *Oriental Insurance Co. Limited* (supra) in the said decision the Court stated:

"Therefore the victim of an accident of his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependents to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

11. We are in agreement with the principles stated by this Court in the aforesaid

decision."

16. A glance at aforesaid observations as well as legal proposition highlighted in above referred judgments, it is abundantly clear that when a claimant prefers a claim petition under Section 166 of the Act before Tribunal seeking compensation, he/she is under an obligation to establish that accident has taken place due to rash and negligent driving of offending vehicle. Claimant cannot be absolved from its obligation to prove negligence on the part of driver, especially, when he approached Court under Section 166 of the Act. To over-come obligation to prove rashness or negligence on the part of driver, Parliament has enacted Section 163-A of the Act. In this case, claimant did not opt to seek compensation by resorting to Section 163-A of the Act. Rather, claimant has approached under Section 166 of the Act and not under Section 163-A of the Act.

17. Adverting to facts of case in hand, admittedly, sole claimant is not an eye witness of accident. Even author of FIR, namely, Ominder son of Hira Lal, who is stated to have been working with Raj Kumar, Contractor, has also not been examined. Not only this, it has also appeared that registration number of car was disclosed by Amit Kumar who has not been produced in witness box to support version contained in petition.

18. In the given circumstances, it can be safely concluded that there is no evidence to prove or establish rashness or negligence on the part of respondent No. 2 or that he was driving car in question which met with an accident chopping off life of Vir Singh. Claimant has failed to prove basic ingredients for grant of compensation under Section 166 of the Act. Findings recorded by learned Tribunal in this regard are perverse and against evidence available on file as well as settled canons of law. Therefore, findings on issue No. 1 are reversed and it is held that respondent No. 1 - claimant has failed to prove that accident occurred due to rash and negligent driving of Maruti car No. HP-17A-3334 while being driven by respondent No. 2.

19. In view of reversal of findings on issue No. 1, this Court is left with no option but to accept the instant appeal whereby impugned award dated August 16, 2013 is set aside. Consequently, claim petition stands dismissed in toto.

20. No order as to costs.