
(2012) 07 DEL CK 0419
In the Delhi High Court
Case No : MAC. APP. 537 of 2009

National Insurance Company Ltd.

APPELLANT

Vs

Chander Prabha and Others

RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

Evidence Act, 1872 — Section 114(g), 149(2)(a)(ii)
Motor Vehicles Act, 1988 — Section 149(2)

Citation : (2012) 07 DEL CK 0419

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Manoj Ranjan Sinha, for the Appellant; A.K. Mishra, Advocate for the Respondents No. 1 to 3 and Mr. Rahul Sharma, Advocate for the Respondent No. 6, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—The Appeal is for reduction of compensation of Rs. 8,35,000/- awarded for the death of Suchir Kumar Chaudhary (a bachelor of 21 years), who died in a motor vehicle accident which occurred on 30.09.2002. The finding on negligence reached by the Claims Tribunal is not challenged by the Appellant, the driver or the owner. Thus, the same has become final between the parties.

2. During inquiry before the Motor Accident Claims Tribunal (the Claims Tribunal) it was claimed that the deceased was in employment with M/s. Ashima Traders (Pvt.) Ltd., 2481/9, Second Floor, Tulsi Bhawan, Karol Bagh, New Delhi and was getting a salary of Rs. 6,000/- per month. The Claims Tribunal relied on the salary certificate and took the deceased's income to be Rs. 6,000/-; added 50% towards the future prospects; deducted 50% towards the personal and living expenses and applied the multiplier of "15" as per the age of the deceased's mother to compute the loss of dependency as Rs. 8,10,000/-. On adding further a sum of Rs. 25,000/- towards pecuniary and non-pecuniary damages, the overall compensation of Rs. 8,35,000/- was awarded.

3. The following contentions are raised on behalf of the Appellant Insurance Company:-

(i) The Claims Tribunal erred in believing the salary certificate Ex. PW-1/C. Although, the employer or his representative was not examined and the salary certificate was not properly proved.

(ii) There was no evidence with regard to the deceased's bright future. The Claims Tribunal erred in granting increase of 50%.

(iii) The Appellant Insurance Company served a notice under Order XII Rule 8 CPC on the addresses of Respondents No. 4 and 6 as given in the Insurance Policy and as mentioned in the Claim Petition. The notices were returned back undelivered. The Respondents No.4 and 6 failed to contest the proceedings. The Insurance Company did whatever was in its power. In the absence of any driving licence being produced, the Claims Tribunal should have presumed that the driver did not possess any driving licence and the Appellant having successfully proved the willful and conscious breach of the terms of policy. The Claims Tribunal erred in not granting the recovery rights to the Appellant.

QUANTUM OF COMPENSATION

4. In order to prove the deceased's income, Respondents No.1 to 3 examined Surender Singh, the deceased's father. He testified that the deceased Sudhir was his only son and was aged 21 years at the time of the accident. He deposed that he has a daughter who is deaf and dumb. He proved the disability certificate in respect of his daughter Anita as Mark X-1. He deposed that his son Sudhir was working with M/s. Ashmia Traders (Pvt.) Ltd., 2481/9, Second Floor, Tulsi Bhawan, Karol Bagh, New Delhi and was getting a salary of Rs. 6,000/- per month. He proved the salary certificate as Ex. PW-1/C and deposed that the deceased used to give entire salary to him.

5. In cross-examination, Surender Singh PW-1 admitted that he was not in possession of any appointment letter given by the employer. He denied the suggestion that his deceased's son was not working with M/s. Ashmia Traders (Pvt.) Ltd. or that the certificate Ex. PW-1/C is fake.

6. Admittedly, Respondents No.1 to 3 did not examine either the employer or his representative. In the circumstances, it was not permissible to place implicit reliance on the salary certificate Ex. PW-1/C.

7. In the absence of any evidence as to the deceased's income, the Claims Tribunal was entitled to grant compensation towards loss of dependency on the basis of deceased's qualification who was a Matriculate as per the mark sheet X-2 placed on record.

8. The deceased's father was a small agriculturist. Thus, deceased Sudhir Kumar had the responsibility to look after his handicapped sister after the death of his father. In the circumstances and peculiar facts of this case, deduction of one-

third is required to be made towards the personal and living expenses and the multiplier as per the age of the deceased should have been given as Respondent No.3, the deceased's sister was younger to him. There was no evidence with regard to the deceased's future prospects.

9. In the case of Santosh Devi v. National Insurance Company Ltd. & Ors., 2012 (4) SCALE 559; the Supreme Court distinguished Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, and held that in case of self-employed and persons having fixed income, an increase to the extent of 30% could be given towards inflation. Para 14 of the report is extracted hereunder:-

14.....In our view, it will be naive to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes

victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

10. The loss of dependency thus comes to Rs. 7,76,131/- (4146/- + 30% x 12 x 2/3 x 18).

11. The deceased was a bachelor. The Claims Tribunal erred in granting a sum of Rs. 10,000/- towards loss of consortium. On the other hand, I would make a provision of Rs. 25,000/- towards the loss of love and affection in addition to Rs. 10,000/- each towards funeral expenses and loss to estate. The overall compensation thus comes to Rs. 8,21,131/-.

12. The Claims Tribunal awarded compensation of Rs. 8,35,000/-. In some of the cases higher amount has been awarded towards the loss of love and affection. In the circumstances, the overall compensation cannot be said to be exorbitant or excessive.

LIABILITY

13. As for as the liability of the Insurance Company is concerned, a notice under order XII Rule 8 CPC Ex. R3W1/B was sent to the Mr. Raghu Raj Singh, driver of truck No.HR-38-BG-5795, (Respondent No.4) and to the Superdar M/s. D.P. Freight Carriers Pvt. Ltd., (Respondent No.5). The notice sent to the Superdar was returned back as refused, whereas notice sent to the driver was not returned back. Similarly, the notice under Order XII Rule 8 CPC (Ex. R3W1/F) was served upon Ms. North West Cases Pvt. Ltd., Respondent No.6, the owner of the truck No. HR-38-BG-5795.

14. In the written statement filed by the Appellant Insurance Company it was averred that the Insurance Company was not liable to pay the compensation as the driver was not holding a proper and valid driving licence to drive Tata 709 No. HR-38-BG-5795.

15. The driver (Respondent No.4) and owner (Respondent No.6) preferred not to contest the Claim Petition despite service.

16. Learned Counsel for Respondent No.6 submits that the written statement was amended by the Appellant Insurance Company after much delay and, therefore, the Insurance Company cannot avoid its liability. It is true that the amended written statement was taken on record on 19.12.2008. The amendment, however, was with regard to the insurance particulars as Respondent No.6, owned two vehicles and there was inter change of the policy number. In my view, the Respondent No.6 cannot shirk its responsibility to abide by the terms of the insurance policy as laid down u/s 149 (2) of the Act.

17. The Appellant Insurance Company examined R3W-1 Dharmender Arya regarding service of the notice under Order XII Rule 8 CPC. His testimony was not challenged as Respondents No.4 and 6 (the driver and owner) were ex-parte. A presumption of service of notice can be drawn against Respondents No.4 and 6

u/s 114 (g) of the Indian Evidence Act.

18. Thus, it is evident that the Appellant Insurance Company did whatever it could do to prove the breach of the terms of the policy. Since the Appellant was not in possession of the particulars of any driving licence, it could not have made any fishing inquiry from any transport authority in this country. A driving licence can be obtained by a driver from any place where he was residing at the time of grant of the driving licence. Since Respondent No.4 and 6 failed to produce a driving licence, it shall be presumed that Respondent No.4 did not possess a valid driving licence at the time of the accident. Respondent No.6 has also not come forward with any explanation as to the circumstances under which he handed over the vehicle to Respondent No.4. An inference of breach of the terms of insurance policy can be drawn against Respondent No.6. I am fortified in this view by a judgment of this Court in *New India Assurance Co. Ltd. v. Sanjay Kumar and Ors.*, ILR 2007(II) Delhi 733 where it was held as under:-

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the CPC calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.

19. Since the Appellant Insurance Company successfully proved the breach of the terms of the policy Ex. R3W1/A in accordance with Section 149 (2)(a)(ii) of the Act, it is entitled to recover the compensation from Respondents No.4 and 6, the driver and the owner of the vehicle.

20. The Appeal is allowed in above terms.

21. The statutory deposit of Rs. 25,000/- be refunded to the Appellant Insurance Company. Pending Applications stand disposed of.