

(2021) 08 SHI CK 0275

In the High Court Of Himachal Pradesh

Case No : First Appeal From Order No. 131 Of 2021

National Insurance Company Ltd

APPELLANT

Vs

Mukhtiar Khan And Others

RESPONDENT

Date of Decision : 27-08-2021

Acts Referred:

Motor Vehicles Act, 1988 — Section 145, 146, 146(1), 147, 147(1), 147(1)(b), 148, 149, 149(1), 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166

Workmen's Compensation Act, 1923 — Section 4, 4A

Citation : (2021) 08 SHI CK 0275

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : Ashwani Sharma, Ishan Sharma, Vinod Chauhan, Hamender Chandel

Final Decision : Disposed Of

Judgement

Jyotsna Rewal Dua, J

A sum of Rupees 3,39,000/- has been awarded in favour of the claimants as compensation on account of death of their son in a motor accident. The liability to pay the compensation amount has been fastened upon the Insurance Company. Aggrieved, the Insurance Company has preferred the instant appeal.

2(i) Mathin Khan was son of respondents No. 1 and 2. On 29.9.2014 he was travelling in vehicle No. HP-17B-6788 from Paonta Sahib to Majra, District Sirmour. The vehicle was being driven by respondent No. 4. It met with an accident causing Mathin Khan's death. His parents filed claim petition under Section 166 of the Motor Vehicles Act for grant of compensation of Rupees 8,00,000/-. The claimants stated that their son was aged about 21 years at the time of accident. He was the sole bread earner of the family, bringing home Rupees 12,000/- per month from his labour/catering work etc. He was in the employment of respondent No. 3-the owner of the ill fated vehicle.

2(ii) The owner of the vehicle/respondent No. 3 submitted in his reply that the deceased was employed by him for loading and unloading of water campers, tent material and catering articles from the vehicle in question. Deceased was travelling in the vehicle in that capacity. The income of the deceased was not more than Rupees 3,000/- per month. Though FIR No. 341 dated 29.9.2014 was registered at Police Station, Majra regarding this accident against respondent No. 4 but the accident was caused because of rash and negligent driving of a truck coming from the opposite direction. Respondent No. 4 i.e. the driver of HP-17B-6788 was not driving the vehicle in a rash and negligent manner. This reply was jointly filed by the owner and driver of the vehicle.

2(iii) The Insurer also resisted the claim petition. Its stand was that the deceased was travelling in the goods carriage vehicle as a gratuitous passenger. It was further pleaded that the deceased was himself negligent as he was standing along with 7-8 persons in the rear of the vehicle.

3. After considering the respective pleadings, evidence and contentions of the parties, learned Tribunal held that the accident occurred due to negligent driving of the vehicle by respondent No. 4. The deceased was held to be travelling in the vehicle as a labourer employed by respondent No. 3 for loading and unloading and not as a gratuitous passenger. His age on the date of accident was determined as 24 years. His income was assessed at Rs. 3,000/- per month. The dependency of the claimants was worked out at Rs. 1500/- per month. Keeping in view the age of the deceased, multiplier of 18 was applied and the totally dependency was worked out as Rs. $1500 \times 12 \times 18 = 3,24,000/-$. An amount of Rs. 15000/- was awarded to the claimants on account of funeral expenses. In all the claimants were held entitled to a compensation of Rs. 3,39,000/- along with interest @9% per annum from the date of filing of the petition till its realization.

4. Learned Senior Counsel for the appellant raised two main contentions for assailing the award. Firstly, that the deceased was travelling in the vehicle as a gratuitous passenger. He was himself negligent as he was standing in the rear portion of the goods carriage vehicle alongwith 7-8 persons, therefore, Insurance Company is not liable to pay any compensation. The second contention raised is that the Insurance Policy for the vehicle in question does not cover the risk of passengers travelling in the goods carriage vehicle. Therefore, the appellant cannot be fastened with liability to pay compensation on account of death of Mathin Khan. Learned counsel for the respondents supported the award. They submitted that deceased was travelling in the vehicle not as a gratuitous passenger but as a labourer in employment of the owner of the vehicle. The accident was caused due to rash and negligent driving of the vehicle by respondent No. 4. I have heard learned counsel for the parties and with their assistance gone through the case record.

4(i) First contention.

4(i)(a) The claimants had pleaded that the deceased was travelling in the vehicle

in question as a labourer and earning Rs. 12,000/- per month. Respondent No. 3 was his employer. The vehicle in question was Mahindra & Mahindra bearing registration No. HP-17B-6788 owned by respondent No. 3.

The owner and driver of the vehicle i.e. respondents No. 3 and 4 filed a common reply and admitted that the deceased was employed by the owner of the vehicle for the purpose of loading and unloading of water campers, tent material and catering articles from the vehicle. It was also admitted that on 29.9.2014 the deceased was travelling in the vehicle in that capacity. Their stand was that the income of the deceased was not more than Rs. 3000/- per month. It was also pleaded by them that the accident had not occurred on account of negligence of respondent No. 4 but because of negligence of driver of another vehicle coming from the opposite side.

4(i)(b) The Insurance Company in its reply took a stand that the vehicle was carrying 7-8 passengers at the time of the accident. This stand was taken only on the basis of the contents of FIR No. 341 dated 29.9.2014. Learned Senior Counsel for the appellant submits that the FIR Ext. PW1/C has been relied upon by the claimants themselves, therefore, the contents of the FIR have to be read and accepted in entirety. The FIR states that 7-8 persons including the deceased were standing in the rear of the goods carriage vehicle. This leads to an inference that the accident occurred because of negligence on part of the deceased himself. Mathin Khan died due to his own negligence.

Learned Senior Counsel for the appellant placed reliance upon following para from (2009) 2 SCC 75, titled National Insurance Company Limited versus Rattani and Others :-

"8. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same. However, in their depositions, the claimants raised a new plea, namely that the deceased and the other injured persons were travelling in the said truck as representatives of the owner of the goods."

4(i)(c) It is well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubts which is followed in criminal cases [Re: (2020) 13 SCC 486, titled Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr.]

In 2021 (1) SCC 171, titled Anita Sharma and Others Vs. New India Assurance Company Limited and Another, Hon'ble Supreme Court reiterated well established principle that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in Motor accident claim cases. The standard of proof in such like matters is one of pre-ponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of courts while examining evidence and material placed on record in accident claim cases is to analyse to ascertain whether claimant's version is more likely than not true. Relevant paras of the judgment are extracted hereunder:-

"17. Unfortunately, the approach of the High Court was not sensitive enough to appreciate the turn of events at the spot, or the appellant claimants' hardship in tracing witnesses and collecting information for an accident which took place many hundreds of kilometers away in an altogether different State. Close to the facts of the case in hand, this Court in Parmeshwari v. Amir Chand, viewed that: (SCC p.638, para 12).

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied."

(emphasis supplied)

22. A somewhat similar situation arose in Dulcina Fernandes v. Joaquim Xavier Cruz, (2013) 10 SCC 646, wherein this Court reiterated that: (SCC p.650, para 7)

"7. It would hardly need a mention that the plea of negligence on the part of the first respondent who was driving the pickup van as set up by the claimants was required to be decided by the learned Tribunal on the touchstone of preponderance of probabilities and certainly not on the basis of proof beyond reasonable doubt. (Bimla Devi v. Himachal RTC" (2009) 13 SCC 530. "(emphasis supplied)"

4(i)(d) In the instant case, entire stand of the appellant with respect to alleged negligence of the deceased in standing in the rear of the vehicle is based upon

contents of the FIR. The best person to prove these specific averments in the FIR was the complainant/informant-Ali Mohd. He has not been examined by the Insurance Company. No suggestion has been given to PW1 Mukhtiyar Khan/claimant during his cross-examination on behalf of the appellant that deceased was standing in the vehicle. PW1 has denied that 7-8 persons were travelling in the vehicle as gratuitous passengers. There is no affirmative evidence on record to prove that 7-8 persons including the deceased were standing in the rear of the vehicle. In their joint reply filed to the claim petition, the driver and the owner of the vehicle (respondent No. 3) did not state that the deceased was standing in the rear portion of the vehicle. The owner of vehicle though admitted a suggestion given to him by the Insurance Company about the deceased's standing in the vehicle, however, his admission is of no significance as he was not present at the spot. The driver of the vehicle did not step into the witness box. There is also nothing to indicate who were the other 7-8 persons alleged to be standing in the vehicle and what happened to them in the accident. It is even otherwise the pleaded case of respondent No. 4 that the accident was caused because of his driving the vehicle to the extreme side of the road for avoiding a collision with an over speeding truck. The FIR has to read conjointly with the statements of claimant, owner of the vehicle and other evidence on record.

Therefore, the findings recorded by the learned Tribunal that the accident had occurred because of rash and negligent driving of the vehicle by respondent No. 4, are in order. The finding of the learned Tribunal that the deceased was travelling as a labourer in the goods carriage vehicle and that he was employed by respondent No. 3 also do not call for any interference. It is not only the case of claimants but also of the owner of vehicle that the deceased was in employment of respondent No. 3 (owner of vehicle) and that he was travelling in the vehicle in that capacity as a labourer.

4(ii) Second contention.

4(ii)(a) Learned Senior Counsel for the appellant next contended that insurance policy for the vehicle in question does not cover the risk of gratuitous passenger travelling in the vehicle. In support of such submission, learned Senior Counsel placed reliance upon a judgment passed by a coordinate Bench of this Court in FAO (MVA) No. 488 of 2012, decided on 24.9.2019, titled United India Insurance Company Ltd. Versus Nirmla Devi and others. The contention of the Insurance Company in that case was that if the vehicle was a goods carriage vehicle and the deceased at the time of accident was travelling in the rear open luggage space of vehicle then he was travelling as an unauthorised gratuitous passenger. In such circumstances, the liability cannot be fastened upon the Insurance Company. The contention of the Insurance Company, as noticed in the aforesaid judgment is as under:

"5. It is vehemently argued by Shri Ashwani K. Sharma, Senior Advocate, assisted by Shri Ishan Sharma, Advocate, for the appellant that the vehicle in question was admittedly a goods carriage vehicle and the deceased at the time

of accident was admittedly travelling in the rear open luggage space of the vehicle as is pleaded by the petitioner in her claim petition and since the deceased was travelling as an unauthorized gratuitous passenger, therefore, the liability could not have been fastened upon the Insurance Company."

After considering plethora of precedents, it was held by the Hon'ble Court as under:

"10. Admittedly, the offending vehicle in the instant case is Mahindra Jeep which is primarily a goods carriage vehicle and not meant for carrying passengers other than the one specified in the policy of the insurance. In the case of a gratuitous passenger, the Insurance Company is not liable to make any payment of compensation as the same contravenes the terms of the policy."

It has already been observed earlier that in the case in hand the deceased was travelling in the vehicle as a labourer employed by respondent No. 3-the owner of the vehicle and further that there is no evidence to suggest about his travelling in the rear of the vehicle or that the accident occurred because of his negligence. The accident was caused due to rash and negligent driving of respondent No. 4. In fact it is the pleaded case of respondent No. 4 that accident occurred because of his driving the vehicle to the extreme side of the road to avoid a collusion with an overspeeding truck.

4(ii)(b) In the instant case, the insurance policy has been placed on record as Ex.RW1/B. As per this policy, premium under Workmen's Compensation for two employees has been charged by the insurer and paid by the Insured/respondent No. 3. It will be appropriate at this stage to refer to Section 147 of the Motor Vehicle Act, which reads as under:

"147. Requirements of policies and limits of liability.

i) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

- a. is issued by a person who is an authorised insurer; and
- b. insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

Against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

Against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required-

- l. to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of

his employment other than a liability arising under the Workmen's Compensation Act, 1923, (8 of 1923.) in respect of the death of, or bodily injury to, any such employee--

- a. Engaged in driving the vehicle, or
- b. If it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or
- c. If it is a goods carriage, being carried in the vehicle, or

To cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

The proviso to Section 147 states that policy shall not be required to cover liability in respect of the death, arising out of and in the course of employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act in respect of death of, or bodily injury to any such employee.

In the instant case the appellant has contracted with respondent No. 3 for covering the liability arising under the Workmen's Compensation Act with respect to his two employees. It will be appropriate at this stage to refer to 2009(3) Shim. LC 211, titled National Insurance Company Ltd. versus Smt. Asha Devi and others. It was a case of a labourer travelling in a goods carriage as an employee of the owner of the vehicle. The Insurance Policy covered the risk under Workmen Compensation. Following observations made in the judgment are relevant in the context of present case:

"21. As far as the liability of the Insurance Company in the present case is concerned, the same is governed by the terms of the insurance policy which is Ext.R/1. The heading of the policy reads as follows:-

"Goods carrying Commercial Vehicle (Open) Policy and Liability only."

22. In the table of premium, basic third party premium of Rs.3580/- has been charged and WC for 6 employees amounting to Rs.150/- has been charged. WC obviously means workmen compensation. There is no other premium which has been charged. This clearly shows that the policy in question covers only 'Act Liability' under Section 147 of the Act. In respect of the employees, the Insurance Company is only required to cover liability confined to the amount payable under the Workmen Compensation Act, 1993. Reference in this regard may be made to the judgment of the Apex Court in National Insurance Co. Ltd. v.

Prembai Patel and others 2005-06 (6) SCC 172 wherein the Apex Court held as follows:-

"12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words 'any person' occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-Section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third party risks. The expression "such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy)" occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

13. The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any such employee as is described in sub-clauses (a) or (b)

or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy."

23. In view of the law laid down by the Apex Court, there can be no escape from the conclusion that the liability of the Insurance Company is limited to the amount payable under the Workmen Compensation Act. In this case, the deceased was 27 years at the time of the accident. His income has been assessed at Rs. 3000/- per month and if the compensation is assessed in consonance with the provisions of Section 4 of the Workmen Compensation Act, the amount payable by the Insurance Company has to be calculated by multiplying 50% of the income by the relevant factor. 50% of the income of the deceased is Rs.1500/-. The relevant factor by taking into consideration the age of the deceased is 213. 57. Therefore, the compensation payable under the Workmen Compensation Act works out to Rs.3,20,355/."

Therefore, when a specific Policy has been taken by respondent No. 3-owner of the vehicle, then the liability of the Insurance Company will be confined to that arising under the Workmen's Compensation Act in terms of the Policy. The award passed by the learned Tribunal assessing the liability is, therefore, not in consonance with the provisions of Policy. Deceased was 24 years at the time of accident. His income has been assessed at Rs. 3000/- per month. If compensation is assessed in consonance with Section 4 and 4A of the Workmen's Compensation Act, the payable compensation becomes:-50% of Rs. 3000X218.47 (relevant factor)=Rs.3,27,705/-. Insurance Company, therefore, is held liable to pay to the claimants a compensation amount of Rs. 3,27,705/- along with interest @ 12% per annum w.e.f. 29.10.2014 till the date of deposit of the awarded amount.

The impugned award is modified in the above terms. The appeal shall stand disposed of, so also the pending application(s), if any.