

(2022) 12 SHI CK 0061

In the High Court Of Himachal Pradesh

Case No : First Appeal Order (MVA) No. 08 Of 2016

New India Assurance Co. Ltd

APPELLANT

Vs

Asha Rani And Others

RESPONDENT

Date of Decision : 19-12-2022

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 166, 168

Citation : (2022) 12 SHI CK 0061

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Raman Sethi, Sunny Modgil, Vinod Thakur

Final Decision : Disposed Of

Judgement

Satyen Vaidya, J

1. The insurer, by way of instant appeal, has assailed the award dated 07.09.2015, passed by learned Motor Accident Claims Tribunal-II, Una in M.A.C.P. No. 37/2014.

2. The claimants (respondents No. 1 to 4 herein) filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (for short 'Act') for grant of compensation on account of death of Sh. Mohinder Chand in a motor vehicle accident involving Truck No. HP-22-7495 and Scooter No. HP-20A-4639 that had taken place on 31.01.2014 at Village Bhadsali, Tehsil Haroli, District Una, H.P.

3. As per claimants, Sh. Mohinder Chand was riding Scooter No. HP-20A- 4639 on his way from office to residence. He was accompanied by Mr. Shyam Mohan, who was on the pillion of the scooter. When the scooter reached near Village Bhadsali, it collided with Truck No. HP-22-7495 from the back side of the Truck. It was alleged that the offending truck was parked by its driver negligently and had left the vehicle in a dangerous position on the road without using parking or indicator lights. Due to dense fog on the road, the parked truck could not be sighted and as a result thereof the accident occurred in the abovesaid manner.

The deceased was stated to be working as Assistant Lineman in H.P. State Electricity Board and his last drawn pay was Rs. 22,630/-

4. The driver and owner of truck (respondents No. 5 and 6 herein) filed their joint reply in which they submitted that the deceased himself was negligent in riding the scooter and as a result thereof the accident had taken place. Reliance was placed on FIR No. 19 of 2014, dated 31.01.2014, registered at Police Station Haroli, according to which, deceased himself was negligent. It was further averred that the driver of the truck was driving the vehicle at very slow speed as the truck was loaded with cement bags. It was on account of rash and negligent driving of the deceased himself that this scooter collided with the truck. The owner/ driver also alleged that at the time of accident the deceased and the person on his pillion were drunk.

5. The insurer (appellant herein) contested the petition separately on the ground firstly that the claimants were not entitled to any compensation for the cause of accident was rash and negligent driving of the deceased himself and secondly, that the insurer was not liable to indemnify the insured as there was serious breach of the terms of insurance policy. According to the insurer, the driver of the truck did not have valid and effective driving license at the time of accident. In addition, various other breaches of the terms of insurance policies were alleged.

6. On the pleadings of the parties, learned Tribunal framed the following issues:-

1. Whether on 31.01.2014 at about 6:45 PM at Bhadsali, respondent NO. 1 was driving truck No. HP-22-7495 rashly and negligently and caused death of Mohinder Chand?

2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPR.

3. Whether the driver of the truck No. HP22-7495 was not holding valid and effective driving license to drive the truck at the time of accident? OPR.

4. Whether the truck in question was being driven without valid registration certificate, fitness certificate and route permit? OPR

5. Whether there is collusion between petitioners and respondents No. 1 and 2 ? OPR

6. Whether the truck in question was being driven and used in violation of terms of insurance policy and Motor Vehicle Act? OPR.

7. Whether the petition is not maintainable as the deceased was himself tort-fesor? OPR.

8. Relief.

Issue No.1 was decided in affirmative. The claimants were held entitled to compensation of Rs. 22,86,528/- with interest @ 9% per annum from the date of filing of the appeal. Issues No. 3 to 7 were decided in negative.

7. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

8. Mr. Raman Sethi, learned counsel for the insurer at the very outset contended that the award passed by learned Tribunal against insurer is not sustainable. He submitted that the factum of accident having been caused due to rash and negligent driving of the deceased himself was duly proved on record. He placed strong reliance on FIR Ext. PW2/A and statement of RW-1, Sh. Hem Raj.

On the other hand, learned counsel for the claimants submitted that learned Tribunal has rightly concluded that the accident was caused due to negligent act of the driver of the truck. He supported his argument with the statement of PW - 5, Sh. Shyam Mohan.

9. Learned Tribunal has held the driver of the truck to be negligent in parking the vehicle on the road. The cause of accident has also been attributed to such negligence. While holding so, learned Tribunal has also placed reliance upon statement of PW-5.

10. On one hand, FIR Ext. PW2/A and the version of RW-1 reveals that the truck was not stationary, it was moving and it was the deceased who was riding the scooter in rash and negligent manner, on the other, PW-5, Shyam Mohan has a different version to tell. According to him, the truck was negligently parked without parking or indicator lights being on and due to dense fog the truck could not be sighted and as a result thereof the accident had taken place. This witness has further stated that the scooter was being ridden by the deceased in a slow speed as there was fog on the road.

11. Learned Tribunal ignored the evidence in the shape of FIR on the ground that it was not a substantive piece of evidence. To counter such findings, learned counsel for the insurer has placed reliance on the judgment passed by Hon'ble Supreme Court in Oriental Insurance Company Ltd. Vs. Prem Lata Shukla and Others, reported in (2007) 13 SCC 476 and National Insurance Company Ltd. Vs. Rattani and Ors., reported in (2009) ACJ 925. On the strength of aforesaid judgments, he has raised the contention that the FIR was proved on record by the claimants and as such they were now precluded from denying its contents.

12. To test the above contention of learned counsel for the insurer, it will be gainful to notice the following extracts from the aforesaid judgments.

In Prem Lata Shukla (supra), where it was observed as under:-

"12. In Narbada Devi (supra) whereupon reliance has been placed, this Court held that contents of a document are not automatically proved only because the same is marked as an Exhibit. There is no dispute with regard to the said legal proposition.

13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the

document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.

14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In *Hukam Singh (supra)*, the law was correctly been laid down by the Punjab and Haryana High Court stating;

"8. Mr. G.C. Mittal, learned counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge, while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to appropriate and reprobate."

13. In *Rattani (supra)*, Hon'ble Supreme Court observed as under:-

"7. 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.

13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.”

14. From aforesaid exposition, it is clear that the FIR can be looked into as a piece of evidence, especially, against the party who places reliance on it. This proposition, in my considered view, will not help the cause of insurer, keeping in view the facts and circumstances of the case. To consider the contents of FIR as piece of evidence is one thing and to take its contents as proof of fact is another. The proof of fact, in motor accident claims cases, depends on the preponderance of probabilities based on entire evidence on record. In the instant case, as noticed above, there was evidence in the shape of oral testimony of PW-5. Learned Tribunal gave precedence to the version of PW-5 over the contents of FIR as also the statement of RW-1 and this Court does not find any reason to interfere with the findings of learned Tribunal to this effect. The FIR recorded the version, which was given to the police by none else than the driver of the truck. He has also been examined as RW-1. As against this, the eye witness to the incident has also deposed before learned Tribunal as PW-5. It was not the case of the driver and owner that there was none on the pillion of the scooter. Rather, it was their specific stand that the deceased and the person on the pillion of the scooter were drunk. In the cross-examination of PW-5, it has not been suggested to him that said witness was not the person on pillion of the scooter at the time of accident. In such view of the matter, the version mentioned in the FIR has to be taken with a pinch of salt for the reason that the driver of the truck would always try to provide such a version, which would save him from the legal consequence. The statement of PW-5, despite his lengthy cross-examination, has not been shattered. Reliance can easily be placed upon his version. Support to such hypothesis can be drawn from the fact that there is no evidence on the allegation that the deceased and pillion were drunk at the time of accident. Another fact is that the investigating officer of the case was not examined to prove the veracity of the contents of FIR either by owner/driver or the insurer.

This neutralizes another argument of learned counsel for the insurer that the police had filed untraced report. Without examination of the record of investigation, no inference can be drawn about the authenticity of the report submitted by police.

15. Learned counsel for the appellant next contended that it was proved on record by way of document Ext. R-Y that the driver was not holding valid driving license. As per him, the Investigator appointed by insurer had sought the information with respect to the driving license held by the driver from the concerned Registering and Licensing Authority and the authority had disclosed that the driving license held by the driver was not issued by such authority. Mr. Raman Sethi, learned counsel has placed reliance on judgment passed by Hon'ble Supreme Court in National Insurance Company Ltd. Vs. Geeta Bhatt and Others, reported in (2008) ACJ 1498 to assert that in the identical fact situation Hon'ble Supreme Court had assumed the driving license of driver as a fake one. However, the contention so raised on behalf of the insurer also deserves to be rejected for the reason that in the facts of that case, the investigator himself had visited the office of Licensing Authority and had inspected the record register. In the instant case, the insurer has simply tendered the investigation report Ext. R-Y without even examining the investigator. The report does not suggest that the investigator had himself seen the records of concerned Registering and Licensing Authority. In such circumstances, the insurer cannot derive any benefit from the above referred judgment.

16. It is settled proposition of law that onus to prove exception is on the insurer. Reference can be made to the following extract from the judgment passed by Hon'ble Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and others reported in (2004) 3 SCC 297 : -

'66. A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception.

67. In MacGillivray on Insurance Law it is stated:

"25-82 Burden of Proof: Difficulties may arise in connection with the burden of proving that the facts of any particular case fall within this exception. The usual rule is that once the assured has proved that the case comes within the general risk, it is for the insurers to prove that it comes within an exception. It has therefore been suggested in some American decisions that, where the insurers prove only that the assured exposed himself to danger and there is no evidence to show why he did so, they cannot succeed, because they have not proved that his behaviour was voluntary or that the danger was unnecessary. Since an extremely heavy burden is imposed on the insurers if they have to prove the state of mind of the assured, it has been suggested in Canadian decisions that the court should presume that the assured acted voluntarily and that, where he

does an apparently dangerous and foolish act, such danger was unnecessary, until the contrary is shown. In practical terms, therefore, the onus does in fact lie on the claimant to explain the conduct of the assured where there is not apparent reason for exposing himself to an obvious danger."

68. In *Rukmani and Others vs. New India Assurance Co. Ltd. and Others* [1999 ACJ 171], this Court while upholding the defences available to the insurer to the effect that vehicle in question was not being driven by a person holding a licence, held that the burden of the insurer would not be discharged when the evidence which was brought on record was that the Inspector of Police in his examination in chief merely stated,

"My enquiry revealed that the respondent No.1 did not produce the licence to drive the abovesaid scooter. The respondent No.1 even after my demand did not submit the licence since he was not having it."

69. The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See *Sohan Lal Passi (supra)*.)

17. Thus, it was solely upon the insurer to discharge the burden of proof regarding allegation of fake license. It was not a case that the driver of offending vehicle was not having any license at all. The insurer itself had taken into consideration a driving license belonging to the driver of the offending vehicle.

18. In the facts of the case, the insurer has miserably failed to discharge the burden of proving invalidity of driving license held by the petitioner.

19. The mode adopted by insurer to prove the factum of fake license was also not in accordance with law. A fact can be proved either by oral or documentary evidence. In the case in hand, the fact that license possessed by driver was not genuine could be proved by production of original record of concerned Licensing Authority, which purportedly had issued such license. It was not a case where primary evidence was not available. The investigation report allegedly submitted by the investigator is merely a hearsay and cannot substitute legal mode required to prove the fact.

20. In light of aforesaid findings, the insurer fails in both its contentions raised before this Court.

21. Learned counsel for the claimants submitted that the compensation granted in favour of the claimants was not just and fair and the same is liable to be enhanced. He contended that learned Tribunal had wrongly deducted 1/3rd from the income of the deceased on account of his personal expenses, whereas it should have been only 1/4th keeping in view the mandate of judgment passed by Hon'ble Supreme Court in *Sarla Verma (Smt) and Ors. Vs. Delhi Transport*

Corporation and Anr., reported in (2009) 6 SCC 121 . He further contended that the learned Tribunal also failed to add the component of income on account of future prospect, for such contention, reliance has been placed on judgment passed by Hon'ble Supreme Court in National Insurance Company Ltd. Vs. Pranay Sethi and Ors.(2017) 16 SCC 680. He has further stated that the claimants have also not been awarded due amount in terms of judgment passed by Hon'ble Supreme Court in Magma General Insurance Company Ltd. Vs. Nanu Ram @ Chuhru Ram and Ors. (2018) 18 SCC 130.

22. The aforesaid contentions have been contested by learned counsel for the insurer on the ground that the claimants have shown their satisfaction with the award and have not filed any appeal or cross-objection and thus, they were not entitled to raise the issue of inadequacy of compensation.

23. Sections 166 and 168 of the Motor Vehicles Act, empowers to Tribunals and Courts with jurisdiction to award just compensation. The appeal is continuation of proceedings undertaken before the Tribunal constituted under the Act. It is the bounden duty of the Tribunals or/and Courts to conclude on just compensation on the basis of material on record. In Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424, the Hon'ble Supreme Court has held as under:

"8. This court has emphasized time and again that "just compensation" should include all elements that would go to place the victim in as near a position as she or he was in, before the occurrence of the accident. Whilst no amount of money or other material compensation can erase the trauma, pain and suffering that a victim undergoes after a serious accident, (or replace the loss of a loved one), monetary compensation is the manner known to law, whereby society assures some measure of restitution to those who survive, and the victims who have to face their lives...."

24. In Sarla Verma (supra), it has been held that where the number of depend family members is 4 to 6, the deduction on account of personal expenses should be 1/4th. In this view of the matter, the award needs to be interfered. Instead of deduction of amount to the extent of 1/3rd from the income of deceased, the deduction has to be 1/4th only and the balance will count towards dependency. It is not in dispute that there are four dependent family members of deceased Sh. Mohinder Chand.

25. In Pranay Sethi (supra), it has been held as under:-

"61 (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

26. In the facts of the case, the age of the deceased was 53 years and by

application of the mandate of Pranay Sethi (supra) an addition of 15% to the actual salary is required to be added while assessing the compensation.

27. Further keeping in view the ratio of judgments passed by the Hon'ble Supreme Court in National Insurance Company Limited vs. Pranay Sethi and others (2017) 16 SCC 680 and Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130, the claimants are entitled to a sum of Rs.15,000/-under the head 'loss of estate', Rs.15,000/- for funeral charges and Rs.40,000/- to each claimant i.e.Rs.1,60,000/-under the head 'loss of consortium'.

28. Thus, the impugned award needs to be modified to the extent that the claimants are held entitled to following amounts:

1. Loss of contribution=Rs.21675 X11X12=Rs.28,61,100/-

2. Loss of estate = Rs. 15,000/-

3. Funeral charges = Rs. 15,000/-

4. Loss of consortium = Rs. 1,60,000/- (Rs.40,000x4)

Total = Rs.30,51,100/-

Claimants are further held entitled to interest at the rate of 9% per annum from the date of petition till its deposit or payment to the claimants whichever is earlier. It is clarified that the apportionment made by the learned Tribunal in the impugned award shall remain the same.

29. The appeal is accordingly disposed of. The impugned award is modified only to the extent as detailed above. The pending application(s), if any, also stands disposed of.