
(2001) 08 RAJ CK 0094

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 53 of 1991

New India Assurance Co. Ltd., Jodhpur

APPELLANT

Vs

Mst. Kamla and Others

RESPONDENT

Date of Decision : 17-08-2001

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 167

Citation : (2002) 3 RLW 1452

Hon'ble Judges : H.R. Panwar, J

Bench : Single Bench

Advocate : J.M. Bhandari, for the Appellant; Vijay Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Panwar, J.—This appeal is directed against the judgment and award dated 10.12.90 passed by Motor Accident Claims Tribunal, Nohar (for short "the Tribunal") whereby the Tribunal awarded compensation for a sum of Rs. 1,50,000/- in favour of respondents-claimants No. 1 to 6 (hereinafter for short "the claimants") and against the appellant. Aggrieved by the judgment and award impugned, the appellant. The New India Assurance Co. Ltd., Jodhpur (hereinafter for short "the insurer") has filed this appeal.

2. I have heard the learned counsel for the parties. Perused the judgment impugned and the record of the case.

3. It was contended by the learned counsel for the appellant that the Tribunal fell in error in awarding compensation to the tune of Rs. 1,50,000/- in favour of the claimants. It was further contended that the deceased was Cleaner of truck No. RRM 3065 involved in the accident and, therefore, the compensation is required to be assessed according to the provisions of the Workmen's Compensation Act, 1923 (hereinafter for short "the Act of 1923").

4. So far as the contention of the learned counsel for the appellant that the compensation is required to be assessed according to Schedule provided under

the Act of 1923, I find no force in the contention raised by the learned counsel for the appellant in this regard. In *Suresh Chandra v. State of U.P. and Anr.* (1) , the Hon''ble Supreme Court held as under:-

"For reducing the amount of compensation from Rs. 1,45,000/- to Rs. 85,000/-, the High Court has accepted the contention advanced on behalf of the respondent advanced on behalf of the respondents herein (appellants before it) that the claimant would have secured only Rs. 85,000/- by way compensation if he had moved the Commissioner of Workmen's Compensation. We do not think that the High Court was right in accepting that reasoning on the facts of this case when the finding is that the accident had occasioned while the roadroller was on the move and the negligence was on the part of the person who drove the roadroller belonging to the respondents."

5. Section 167 of the Motor Vehicles Act, 1988 (hereinafter referred to as the "Act") provides option regarding claims for compensation in certain cases. Section 167 reads as under:-

"Section 167. Option regarding claims for compensation in certain cases. Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

6. Thus, the Parliament has in its wisdom enacted Section 167 which laid down that the claimant has a right to claim compensation under either of both the Acts, namely Motor Vehicles Act and Workmen's Compensation Act, 1923. It would be open to him to claim the compensation under one of the two Acts and not under both. If the victim or his legal representative, therefore, prefers to claim the compensation under the Motor Vehicles Act, he or they, as the case may be, will be debarred from claiming the compensation under the Workmens' Compensation Act, or if he or they claim under Workmens' Compensation Act, he or they will be debarred from claiming the compensation under the Motor Vehicles Act. In the instant case, the claimants have filed the claim for compensation before Motor Accident Claims Tribunal for death of Khema Ram. Thus, the language of Section 167 of the Act makes it clear that it is open for the claimants either to claim the compensation before the Motor Accident Claims Tribunal under the provisions of the Motor Vehicles Act, 1988 or before the Workmen's Compensation Commissioner under the provisions of the Workmen's Compensation Act, 1923. Thus, the option lies to the claimant either to claim compensation under the provisions of the Motor Vehicles Act or under the provisions of the Workmen's Compensation Act, 1923 but not under both the Acts.

7. A similar view has been taken by this Court in *The New India Assurance Co.*

Ltd. v. Shanker Lal (2), wherein in a similar situation, this Court dismissed the appeal filed by the Insurance Company on the same point. Thus, in my considered opinion, the contention raised by the learned counsel for the appellant in this regard has no merit and is rejected.

8. It was further contended by the learned counsel for the appellant that the compensation awarded by the Tribunal is on the higher side. I am afraid this ground is not available to the Insurance Company. It is settled law that Insurance Company can defend the cause only on the grounds provided in Section 96(2) of the Motor Vehicles Act, 1939 corresponding to Section 149(2) of the Motor Vehicles Act, 1988, which reads as under:-

"No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle.

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle: or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular."

9. Indisputably, none of the defences/grounds as envisaged in sub-section (2) of Section 149 of the Act exists in this appeal and the challenge to quantum of compensation on the ground that it is on higher side is beyond the scope of defences provided under the aforesaid section. In this view of the matter, the

appellant insurer has no right to maintain the appeal challenging the quantum of compensation.

10. Thus, in view of the settled law, the appellant insurer cannot challenge the award of compensation assessed and awarded by the Tribunal. Even otherwise, the Tribunal awarded a meagre amount of Rs. 1,50,000/- in the case of death of a young person of 30 years of age having widow with four minor children dependents. Thus, the contention raised by the learned counsel for the appellant fails and is rejected.

11. It was further contended that the Tribunal fell in error in holding the appellant liable for the impugned award. It was contended that the appellant can only be held liable if the insured i.e. the owner of the vehicle is first held liable then only the appellant is required to indemnify the award as provided in Section 149(1) of the Motor Vehicles Act, 1988, which clearly provides that the judgment or award in respect of any such liability as is required to be covered by a policy which is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments. The learned counsel for the appellant contended that since in the instant case, no award has been passed against the insured and, therefore, the insurer cannot be held liable for the award which is not against the insured. It is true that the appellant insurer is liable by the provisions of the Motor Vehicles Act to indemnify the insured by virtue of the insurance policy obtained by the insured and, therefore, the insured being master of the tortfeasor, is required to be held vicariously liable and the appellant insurer by virtue of the insurance policy is legally liable to indemnify the award made against the insured. It is correct that no award has been passed against the owner insured and the driver of the truck. Award has only been passed against the appellant Insurance Company and the liability of the Insurance Company-appellant is co-extensive with that of the insured. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver respondent No. 8 Pradeep and as such, his employer insured Dulichand was also liable for the negligence of his servant, the truck driver. This error can be corrected by this Court by invoking the provisions of Order 41 Rule 33 C.P.C. even if no cross appeal or cross objection has been filed by the respondent-claimants. Order 41 Rule 33 C.P.C. reads as under:-

"Power of Court of Appeal.-The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as

to part only of the decree and may be exercised in favour of all any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been tiled against such decrees:

Provided that the Appellate Court shall not make any order u/s 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

12. In *Kok Singh v. Deokabai* (3), the Hon"ble Supreme Court observed in para No. 7 as under:-

"Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge."

13. In *Giani Ram and Ors. v. Ramji Lal and Ors.* (4), the Court said that in Order 41, Rule 33 the expression "which ought to have been passed" means "which ought in law to have been passed" and if the appellate court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

14. This Court in *Murari Lal v. Gomatl Devi* (5), and *United India Insurance Co. Ltd. v. Delhi and Ors.* (6), also took the similar view. Thus, by invoking the provisions of Order 41 Rule 33 C.P.C., I hold the appellant liable alongwith respondents No. 7 and 8 jointly and severally for the compensation awarded.

15. No other point was pressed.

16. In view of the aforesaid discussion, this appeal fails and accordingly, it is hereby dismissed. No order as to costs.