
(2005) 09 MP CK 0034
In the Madhya Pradesh High Court
Case No : M.A. No. 532 of 2000

Oriental Insurance Co. Ltd.	Vs	APPELLANT
Geeta Sharma and Others		RESPONDENT

Date of Decision : 06-09-2005

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 170

Citation : (2006) ACJ 1595

Hon'ble Judges : S. Samvatsar, J

Bench : Single Bench

Advocate : Vandana Kekre, for the Appellant; Mahesh Haswani, for the Respondent

Final Decision : Dismissed

Judgement

S. Samvatsar, J.—This appeal is filed by insurance company challenging award dated 9.5.2000 passed by Ninth Additional Member Judge, Motor Accidents Claims Tribunal, Gwalior, in Claim Case No. 144 of 1997, whereby the Claims Tribunal has awarded an amount of Rs. 2,49,500 plus 12 per cent interest thereon for the death of Mahendra Sharma.

2. The claimant No. 1 is the widow of the deceased Mahendra Sharma, while the claimant Nos. 2, 3 and 4 are minor daughters. The claim petition was filed alleging that on 28.8.1997 Mahendra Sharma was driving a truck No. MP 08-9787. The truck was loaded with bricks. He was going in the truck towards Shivpuri. Truck bearing No. HRO 38-1748 which was owned and driven by respondent Sukkha came rashly and negligently and dashed against the truck driven by Mahendra Sharma from the front side. A report of this accident was lodged and subsequently application for compensation was filed before the Claims Tribunal.

3. The Claims Tribunal found that the accident has occurred due to rash and negligent driving of respondent Sukkha, due to which Mahendra Sharma died.

The Tribunal awarded a sum of Rs. 2,49,500 as compensation to the claimants for his death.

4. This appeal is filed by the insurance company challenging the quantum and also questioning negligence. Normally, the question of quantum and negligence are not open to the insurance company. However, since the driver and the owner of the vehicle were ex pane, an application u/s 170 was moved by the insurance company and the said application was allowed by the Claims Tribunal by order dated 30.9.1999. From the bare perusal of order dated 30.9.1999 it appears that the court below has granted permission to the insurance company without any application of mind and without disclosing any reason. The only sentence written by the Tribunal for granting the permission is that since the respondent Nos. 1 and 2 are ex parte, the application is allowed after due consideration. Section 170 provided that the application under this section is to be allowed only after reasons to be recorded in writing. The said section reads as under:

170. Impleading insurer in certain cases.-Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

5. However, as the Claims Tribunal has granted permission to the insurance company to contest the claim, it will be proper to the court to decide the matter on merits. The first contention by Ms. Vandana Kekre, learned Counsel for the insurance company is that Claims Tribunal has erred in holding that respondent Sukkha Singh, who was driver of the offending truck was negligent and due to his negligence accident has taken place.

6. The claimants in para 2 of the claim petition has specifically averred that truck No. HRO 38-1748 driven by respondent Sukkha Singh was going at a high speed and driven rashly and negligently, due to which this accident has taken place. The respondent Nos. 1 and 2, i.e., driver and owner have not filed any written statement denying the said allegation. The insurance company has filed a written statement in which the company has denied the said allegation.

7. An issue to that effect was framed by the trial court, which is issue No. 1. The Claims Tribunal after recording evidence and appreciating the same found that the accident has taken place due to rash and negligent driving of respondent Sukkha Singh.

8. To prove the allegations about rash and negligent driving the claimants have examined one Rupesh Bajpayee, who is examined as AW 2. He says in a statement that he knew Mahendra Sharma who died in the accident. He was driver of truck No. MP 08-9787 and this witness was a cleaner in the said truck. He says that on the date of the accident he was also in the truck carrying the bricks. He said that truck was going towards Shivpuri and reached near village Bilawa in the night at about 2 a.m. The truck driven by the respondent came from opposite side. The truck was on high speed. He said that the deceased Mahendra Sharma took his truck to the left side, however, the truck dashed against him and Mahendra Sharma died on the spot. He says that his hand was also fractured in the said accident. He says that the offending truck was driven by Sukkha Singh. The respondents have cross-examined this witness but could not bring any fact to disbelieve this witness. Moreover, when this witness was injured in the accident his presence on the spot cannot be doubted and, therefore, Claims Tribunal has rightly believed his statement. The respondents have not led any evidence to controvert the statement of Rupesh Bajpayee, AW 2. The respondent has not even examined Sukkha Singh who was driving the offending truck. It is a well settled principle that in a case of death in accident only two persons can explain the accident, first is the deceased and second is the driver of the offending vehicle. Deceased died on the spot, hence he is not available for deposition. In such circumstances, it is for the driver of the offending vehicle to step into the witness-box and explain the accident failing which principle of *res ipsa loquitur* is applicable.

9. Considering this fact, the finding arrived at by the Claims Tribunal that the accident has taken place due to rash and negligent driving of Sukkha Singh cannot be interfered.

10. Counsel for the insurance company had tried to demonstrate that the accident has taken place due to rash and negligent driving of the deceased. She submitted that in the F.I.R., it is given that driver of the vehicle MP 08-9787 (deceased) has suddenly taken the vehicle on the right side to save the life of cattle which suddenly came on the road, this has resulted, into an accident. This fact is mentioned in the F.I.R. This argument is without any force, firstly, because the F.I.R. is not proved by examination of the police officer who recorded the same, in the absence of whom, who has lodged the F.I.R. should have been examined. The F.I.R. was lodged by Om Prakash Dubey, owner of the vehicle, which was driven by Mahendra Sharma but he was not examined as a witness. Moreover, Om Prakash Dubey was not present on the spot. Thus insurance company has also not examined said Om Prakash Dubey or the police officer who has recorded the F.I.R. He says that in absence of this proof, F.I.R. cannot be believed. The counsel for the appellant has relied on the judgment of Apex Court in case of *Haji Zainullah Khan (Dead) by Lrs. Vs. Nagar Mahapalika, Allahabad*, . In that case Apex Court has held that if a truck has come suddenly to the right side in order to save rickshaw going ahead and dashed against the cyclist then truck driver is negligent. From perusal of the said judgment it appears that the

said judgment instead of helping the appellant helps the case of respondent because even the allegations in the F.I.R. are accepted still then the truck driven by deceased was taken on the right side to avoid accident with the cattle. Thus, the deceased was not at all negligent as per the said judgment.

11. Another judgment relied on by the counsel for appellant is in case of Parkash Vati and Others Vs. Sulakhan Singh alias Lakha and Others, in that case the Tribunal on the basis of F.I.R. and other findings has come to the conclusion that the statement of the witnesses of claimants are not believable and the said finding was maintained up to High Court by the single Judge and, therefore, the Division Bench in L.P.A. has held that in such a case principle of *res ipsa loquitur* will not be applicable.

12. Another judgment is of Division Bench in case of Kanhaiyalal and Another Vs. Sitabai and Others, . In that case the finding of the court was that accident has taken place due to negligence of the driver but here this is of no assistance. Hence the aforesaid case is also distinguishable.

13. Next judgment relied on by the appellant is in case of C.N. Krishna Murthy Vs. P. Shashidhara Murthy and Others, . In that case the motor cycle was hit by a tanker from behind and the court found that negligence of the truck was not proved by leading any evidence. The last judgment is in case of Mohammad Arshad Vs. Naimuddin Nasimuddin and Another, . In that case claim petition was dismissed as the injured-claimant did not plead and prove negligence on the part of the driver, but this is not the situation in the present case. Moreover, the Division Bench of this Court in case of Smt. Sushila Bhadoriya and Others Vs. M.P. State Road Transport Corporation and Another, , had laid down that in the case of composite negligence the claimant may implead owner or driver and the insurance company of both the vehicles or may proceed against any one of them. In view of this judgment and the facts of the present case, I find that Claims Tribunal has not committed any error in holding that the accident has taken place due to rash and negligent driving of respondent Sukkha Singh. Hence, this appeal is without any merit and is dismissed with costs. The counsel's fees was Rs. 1,000.