
(2009) 05 GUJ CK 0017

In the Gujarat High Court

Case No : First Appeal No. 2928 of 2007 and C.A. No. 8196 of 2007

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Gunvantba Mularajsinh Jadeja and Others

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 147(1), 166, 167, 170

Citation : (2010) ACJ 1077 : (2009) 2 GLR 1596

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Megha Jani, for the Appellant; Premal S. Rachh, for Defendant Nos. 1 to 6, 7 and 8, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard the learned Advocates appearing on behalf of respective parties.

2. The appellant-Insurance Company has challenged the award passed by Motor Accident Claims Tribunal, Jamnagar in Claim Case No. 4148 of 1998 decided on 22nd May, 2006, where Claims Tribunal has awarded Rs. 7 lakhs with 7.5% interest in favour of respondent-claimants.

3. Learned Advocate Ms. Jani raised contentions before this Court that Claims Tribunal has failed to appreciate that deceased was travelling as a gratuitous passenger and not as a Cleaner as claimed, therefore, Insurance Company cannot be held liable to pay any compensation. The F.I.R. is filed by one of the passenger travelling in Matador, but F.I.R. does not mention that deceased was travelling as a Cleaner. In Matador, approximately eight passengers were travelling where driver, owner, conductor and all passengers belong to village Toda. Therefore, it is not possible that name of deceased and his alleged capacity of Cleaner of Matador does not figure in the F.I.R. Learned Advocate Ms. Jani further submitted that affidavit filed by owner shows that deceased was

employed by him as a Cleaner. If the owner mentioned that deceased was travelling as a gratuitous passenger, the entire liability would rest on him and Insurance Company would be exonerated. The charge-sheet also does not mention that deceased as a Cleaner of the truck. The owner has not produced any evidence like his books of accounts or other detail showing that he was paying Rs. 2,000/- as salary and Rs. 1,000/- as bhattha to deceased since last three years as claimed by him. She also raised contention that without prejudice to aforesaid contention, deceased was travelling as a Cleaner, the liability of Insurance Company would be limited to that under the Workmen's Compensation Act, 1923. She relied upon the decision of Apex Court in case of National Insurance Co. Ltd. Vs. Prembai Patel and Others, She also raised contention that against employer, an employee has no right to file claim petition if the risk is covered under the provisions of Workmen's Compensation Act. The accident occurred on 1st April, 1998 and policy was effective on the date of accident. Therefore, amount which has been awarded by Claims Tribunal is on higher side and monthly wages of claimant cannot be exceeded Rs. 2,000/- per month and taking 50% of monthly wages and adopting relevant factor of 203.83 considering age of deceased to be 32, payable compensation would be Rs. 2,03,850/- as against Rs. 7 lakhs. She also raised contention before this Court that income from agriculture source is also included while awarding compensation, which is also a basic error committed by Claims Tribunal in awarding compensation in favour of claimants. This Court has simply asked a question to learned Advocate Ms. Jani that whether Insurance Company has obtained permission under provisions of Section 170 of M.V. Act or not? The answer is given that on 1st July, 2005, a Claims Tribunal has allowed application on the same day granting permission to Insurance Company under the provisions of Section 170 of the M.V. Act. The Claims Tribunal has granted permission u/s 170 on what ground when owner of vehicle had appeared and gave evidence before Claims Tribunal. Except that, no other contention is raised by learned Advocate Ms. Megha Jani before this Court.

4. Learned Advocate Mr. Premal Rachh appearing on behalf of respondent-claimants submitted that deceased Cleaner was working with owner of vehicle as an employee of employer-Bapalal Jadeja. The owner of Matador has paid an additional premium covering complete risk of Cleaner as an employee in case of death or bodily injury and Insurance Company has accepted complete liability being not restricted liability under the provisions of Workmen's Compensation Act. Therefore, he submitted that decision which has been relied upon by learned Advocate Ms. Jani in case of National Insurance Co. Ltd. Vs. Prembai Patel and Others, is not applicable to facts of this case, because, in case if premium is paid covering complete of employee, then, Insurance Company is legally duty-bound to pay compensation to claimant. The Insurance Company is not entitled to raise objection on the ground that Insurance Company having a limited and restricted liability as provided under provisions of the Workmen's Compensation Act. He relied upon Para 13 of said judgment which is quoted as under:

13. The Insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy where under 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.

5. Learned Advocate Ms. Jani had not made submissions before this Court that policy which has been obtained by owner of vehicle is an "act policy" and additional premium is not paid by owner of vehicle, means, that additional premium was paid by owner of vehicle and risk of deceased is covered under policy because of additional premium paid by owner of vehicle. It is necessary to note that no such submission was made by appellant-Insurance Company before Claims Tribunal also that liability of Insurance Company is restricted under provisions of Workmen's Compensation Act. If this contention was argued and raised before Claims Tribunal, then, claimant must have got opportunity to point out before Claims Tribunal that additional premium was paid covering risk of deceased. Now, to raise such contention which is based on facts that whether policy was obtained or not? Whether it covers risk of deceased or not? Whether it is a restricted policy under provisions of the Workmen's Compensation Act or not? Therefore, in such circumstances, contentions raised by learned Advocate Ms. Jani relying upon aforesaid decision of Apex Court in case of National Insurance Co. Ltd. Vs. Prembai Patel and Others, cannot be accepted.

6. Learned Advocate Mr. Rachh also submitted that contention which has been raised by appellant-Insurance Company must have to be proved before Claims Tribunal by leading proper evidence. Whether additional premium covered risk of deceased or not and whether condition incorporated in Insurance policy restricted liability of Insurance Company or not. For that, there was no evidence on record produced by Insurance Company before Claims Tribunal. Therefore, he submitted if such evidence was led before Claims Tribunal, then, claimant can have opportunity to defence his case on the basis of evidence on record, but, if such contention is raised first time before this Court, naturally, claimants have no opportunity to meet with such contentions which have been raised first time before this Court. Therefore, he submitted that this Court may not encourage the contentions which have been raised first time before this Court and this Court may not entertain such contentions which have been raised before this Court first time. Therefore, he submitted that contentions raised by learned Advocate Ms. Jani may be rejected. He relied upon the decision of Apex Court in case of Krishi Utpadan Mandi Samiti v. Arvind Chaubey, (2002) 9 SCC 549 The relevant Para 2, therefore, quoted as under:

2. Learned Senior Counsel for the appellant contended that the appellant-Mandi Samiti is not an "industry" governed by the provisions of the U.P. Industrial Disputes Act, 1947. The High Court has held against the appellant on the ground that such a contention was not canvassed before the Industrial Tribunal and also following an earlier decision of another Bench, the High Court dismissed the writ petition. Once, the appellant did not raise such a contention before the Industrial Tribunal, it was not available to be canvassed higher up.

7. Learned Advocate Mr. Rachh also relied upon the decision of Apex Court in case of Maharashtra State Mining Corporation v. Sunil, S/o. Pundika Rao Pathak reported in 2006 SCC (L&S) 926. The relevant Para 4 is quoted as under:

4. In the writ petition, the respondent had taken several grounds for challenging the dismissal order for example, that the relevant documents were not supplied, that he was not allowed to cross-examine the witnesses, that he was not allowed to engaged a lawyer, etc. However, a perusal of Para 6 of the impugne judgment of the High Court shows that the writ petitioner did not press any of the grounds. The only ground which was pressed was that the order of dismissal was passed by the Managing Director of the appellant, who had no authority or power to do so, as the same was vested in the Board of Directors of the appellant. In view of the fact that the respondent had not pressed these grounds before the High Court, we cannot allow him to urge these points before us. The only issue which the High Court was called upon to decide was whether the removal of the respondent from service was by a competent authority.

8. Learned Advocate Mr. Rachh also relied upon the decision of Apex Court in case of Orissa Industrial Infrastructure Development Corporation v. Ashok Kumar Singh and Ors. reported in 2006 SCC (L&S) 999. The relevant Para 2 is quoted as under:

2. In support of the appeal, Mr. S. B. Sanyal, the learned Senior Counsel for the appellant sought to put forth the plea of back-door entry, non-existence of vacancy or ban on creation of the posts issued by the Government of Orissa in the year 2001. The appellant cannot be permitted to put forth any of these pleas. No plea was raised before the High Court about any back-door entry or non-existence of the vacancies. In fact, before the High Court the appellant who was respondent in the writ petition did not choose to file even counter-affidavit. The Corporation only filed a memo dated 29-10-1992 along with an affidavit of Joint Manager (Law) of the Corporation, inter alia, giving the details of the writ petitioners whose services had been regularised, further stating that "other petitioners shall be regularised in due course in accordance with the settlement". The employees have been in the service of the appellant-Corporation from 1981 to 1986, except seven who joined the Corporation in 1987 and 1988. In respect of none of these employees the plea raised before the High Court was that they secured entry into service by back-door nor was there any plea about nonavailability of the vacancies. Regarding the so-called ban said to have been imposed in the year 2001 there is nothing on record of this appeal about any

such ban. Prima facie, we are unable to comprehend its relevance while considering the correctness of the impugned judgment delivered in the year 1992. No affidavit has been filed placing on record any such ban. We cannot permit, on the facts and circumstances of the case, oral submission across the Bar on such an issue.

9. Learned Advocate Mr. Rachh further relied upon the decision of Apex Court in case of National Fertilizers Ltd. and Ors. v. Somvir Singh reported in AIR 2006 SCW 2972. The relevant Para 15 is quoted as under:

15. Such a plea does not appear to have been raised before the High Court. The question as regards the nature of duties required to be performed by the respondents having not been raised. No material was placed by the employer to show as to whether the job of the respondents was within the purview of the aforementioned provision. The respondents themselves stated that they raised the question of applicability of the said provision of the Act in a suit filed at Jagadhri when another person was appointed as Peon-cum-Messenger. It, therefore, cannot be said that they were not aware of the statutory provisions contained in the said suit.

10. I have considered the submissions made by both the learned Advocates appearing on behalf of respective parties. I have also perused the award passed by Claims Tribunal, Jamnagar.

11. The accident occurred on 1st April, 1998, where, Cleaner Mulrajsinh Jadeja died. Therefore, application u/s 166 of the M.V. Act is filed by widow, minor children, father and mother of deceased. Accident occurred on 1st April, 1998 when deceased was travelling as a Cleaner in Matador bearing registration No. GJ-3-T-5961 which was going to Toda to Kalavad and when they reached to Makrana-Jhalod village patiya, Matador was not controlled by driver due to rash and negligent driving, and therefore, certain passengers travelling in Matador received injuries and Cleaner was died. The criminal case was lodged against driver of Matador before Kalavad Police Station being F.I.R. No. 34 of 1998. The Cleaner was a married person having 26 Acre agriculture land and also working as a Cleaner in Matador. A written statement was filed by Insurance Company at Exh. 18, where averments made by claimant were denied by Insurance Company. But, it is necessary to note at this stage that whatever the contentions raised in appeal memo, same were not raised by Insurance Company in written statement filed before Claims Tribunal by appellant Insurance Company. Before Claims Tribunal, owner of Matador is Bapalal Jadeja and driver is Narendrasinh Bapalal Jadeja - son of owner and having Insurance policy from appellant-Insurance Company and respondent Nos. 1 and 2 means driver and owner had appeared before Claims Tribunal by an Advocate Mr. G. G. Pandya, but they did not file reply and on behalf of appellant-Insurance Company, learned Advocate Mr. J. M. Mehta had appeared. Before Claims Tribunal, widow Gunvantba has filed an affidavit Exh. 40 and owner of Matador - Bapalal Jadeja has also filed an affidavit Exh. 44. Except that, no other evidence has been produced by claimant.

The charge-sheet has been exhibited vide Exh. 26, p.m. Note at Exh. 27, copy of birth date of deceased Mulrajsinh at Exh. 28, Death Certificate at Exh. 29, Birth Certificates of Minor Mahavirsinh, Minor Dharmishthaba Mulrajsinh, and Minor Mandipsinh vide Exhs. 30 to 32, Copy of complaint vide Exh. 33, panchnama at the scene of occurrence at Exh. 34, Inquest panchnama at Exh. 35, Village abstract No. 8/A at Exh. 36, copy of driving licence was also produced at Exh. 37, and Insurance policy at Exh. 38, income certificate of deceased at Exh. 46 and xerox copy of R. C. Book of Matador No. GJ-3-T-5961 at Exh. 50 have been produced before Claims Tribunal by claimant.

12. The issues have been framed by Claims Tribunal in Para 9. Thereafter, Claims Tribunal has discussed evidence in Para 11. According to evidence of owner of Matador, deceased was appointed by him as a Cleaner and working with him for more than five years and he was receiving the salary of Rs. 2,000/- and Rs. 1,000/- being an allowance paid to him. In all, Rs. 3,000/- was paid to Cleaner deceased as per certificate Exh. 46. The widow was examined at Exh. 44 and according to her evidence, deceased has an agriculture field and also having income from agriculture field. The contentions raised by Insurance Company that Cleaner was travelling as a passenger and he was not travelling as a Cleaner. That fact has been discussed by Claims Tribunal in Para 12 and considering evidence of widow and owner of Matador which was cross-examined by Advocate of Insurance Company, and then, come to conclusion that deceased was working as a Cleaner and there was nothing adverse to claimant pointed out by Advocate of Insurance Company from cross-examination of widow as well as owner of Matador. The deceased was also working in field having the income from the land of 26 Acre and also produced rationing card Exh. 36 and he was only son of Kanubhai Shivubhai. The copy of rationing card was also produced vide Exh. 36. The village Form No. 8/A was also produced and Claims Tribunal has considered that agriculture work does not remain continuous for 12 months. So, in between period, deceased was working as a Cleaner and considering income Rs. 24,000/- yearly and also considering Rs. 2,000/- income as a Cleaner, total would come to Rs. 4,000/-, then, future prospect has been considered by Claims Tribunal Rs. 4,000/- as a Cleaner and Rs. 2,000/-, then, 1/2 comes to Rs. 3,000/- then, it comes to Rs. 36,000/- yearly adding Rs. 24,000/- agricultural income, total comes to Rs. 60,000/-, and thereafter, deducting Rs. 20,000/- being a personal expenses, 1/3rd which comes to Rs. 40,000/- then, looking to age of deceased 32 years, 17 multiplier has been applied which comes to Rs. 6,80,000/-, then, Rs. 20,000/- conventional amount, total comes to Rs. 7 lakhs.

13. The aforesaid calculation is objected by learned Advocate Ms. Jani. She objected that agriculture income cannot be taken into account because person cannot work as a Cleaner and also on the field simultaneously. These two types of work is not possible to do for deceased. She also raised contention that looking to policy, if claim case is filed by claimant under the provisions of Workmen's Compensation Act, then claimant is not entitled more than Rs. 2 lakhs against amount as awarded Rs. 7 lakhs. She also objected that future

prospect of Cleaner has been taken into account by Claims Tribunal which is also an error committed by Claims Tribunal.

14. I have considered contentions raised by learned Advocate Ms. Jani. No doubt, these are contentions raised first time before this Court and emphasis on it as if that legal contentions can be permitted at any time before appellate Court. I appreciate submissions made by learned Advocate Ms. Jani. But, if legal contention is available to appellant at any time before appellate Court, the same must be available earlier to appellant before Claims Tribunal, therefore, why it was not raised before Claims Tribunal. For that, there is no answer by Insurance Company. If contention which was not raised before Claims Tribunal and raised first time before this Court, Claims Tribunal had no opportunity to deal with and examine such contention and Claims Tribunal remained without examining such question, for which, Claims Tribunal is competent to decide this contention if it was raised by appellant before Claims Tribunal.

15. According to my opinion, it is a duty of Claims Tribunal to consider only contention which was raised before it. Except that, there is no duty of Claims Tribunal to consider other contentions. The contentions which are not raised before Claims Tribunal, such contention is not permissible to raise before this Court first time. Otherwise, it amounts to do injustice to other side. Such type of approach cannot be encouraged by this Court. If these all contentions were raised before Claims Tribunal by Advocate of Insurance Company, then, Claims Tribunal must have to examine it as to whether limited liability or not? Whether application can be made before Claims Tribunal or not? And also consider scope of Section 167 of M.V. Act? The agricultural income is also an evidence before Claims Tribunal of widow as well as Village Form No. 8/A was also produced and father of deceased was having 26 Acres land. These are evidence on record which are cross-examined by Advocate of Insurance Company. Even though, the contentions were not raised by Advocate of Insurance Company before Claims Tribunal. The contentions which are raised before this Court are not pure questions of law. It is a mixed question of fact and law which require evidence of claimants before Claims Tribunal, and therefore, contentions in respect of limited liability and not filed an application before Workmen's Compensation Commissioner, then, no contention is raised before Claims Tribunal, that Claims Tribunal has no jurisdiction to decide such claim petition. So, these are lapse on the part of Insurance Company not to raise a relevant contentions before Claims Tribunal and then to raise such contentions before appellate Court under the guise that these are the legal contentions which can be raised before appellate Court at any time. Such type of practice cannot be encouraged by this Court, otherwise, a party remained silent before trial Court in respect of legal contentions intentionally and not to give opportunity to trial Court to examine such legal contentions, then, matter can go against the party and then, raised legal contentions before this Court to raise legal contentions for first time, according to my opinion, a party, should have to remain alert at the time of trial and at that occasion, a party remained negligent and careless and not to proceed

with vigilantly before trial Court, then, such opportunity is not available to a party to higher forum. In short, appellant-Insurance Company wants an opportunity before this Court to raise a legal contentions. In fact, it is not a pure question of law, but, it is a question of fact and law. Therefore, I am not encouraging Advocate of appellant-Insurance Company for permit to raise such contentions before this Court first time, and therefore, I am rejecting contentions which are raised first time before this Court. The appellant-Insurance Company cannot be permitted to utilise appellate forum for filling gap which remained before Claims Tribunal. Such approach must have to deprecate.

16. Apart from contentions, Claims Tribunal has no jurisdiction because of policy which covers risk under the Workmen's Compensation Act. Section 167 which gives option claims for compensation in certain cases which is quoted as under:

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.

[See : 2005 (2) GLH 393 - Nasimbanu Wd/o. Sirajuddin Amruddin Kazi v. Ramjibhai Bachubhai Ahir].

17. Merely a bare reading gives answer to contentions raised by learned Advocate Ms. Megha Jani. Therefore, according to my opinion, a claimant has rightly filed claim petition before this Claims Tribunal u/s 166 of the M.V. Act. For that, Claims Tribunal has rightly entertained it and decide it. For that, Claims Tribunal has not committed any error which requires interference by this Court. The owner's evidence is enough after cross-examination of Advocate of Insurance Company which has been rightly considered and believed by Claims Tribunal and evidence of widow is also equally important and rightly relied upon by Claims Tribunal.

18. It is necessary to note that no person or witness was examined by appellant-Insurance Company before Claims Tribunal. The only evidence of widow as well as owner of Matador was available. The documents are exhibited which have not been disputed by Insurance Company has rightly relied upon by Claims Tribunal. For that also, Claims Tribunal has not committed any error. Therefore, contention is that in Workmen's Compensation case, claimant is entitled only Rs. 2 lakhs and some amount is not accepted and this contention has not raised before Claims Tribunal. According to my opinion, on the basis of evidence, compensation has been rightly calculated by Claims Tribunal which cannot consider to be on higher side in any manner. On the contrary, a reasonable, just and proper compensation has been awarded which requires no interference by this Court. The finding given by Claims Tribunal is just and proper which cannot consider to

be a base less or perverse or improper. On the contrary, a finding is based on legal evidence which does not require interference by this Court.

19. Therefore, there is no substance in present appeal. Accordingly, present appeal is dismissed. When the appeal is dismissed by this Court today, no order is required to be passed in Civil Application. Accordingly, Civil Application is disposed of.

20. The amount, if any, deposited by appellant before registry of this Court, be transmitted to Claims Tribunal concerned immediately.