(2023) 08 J&K CK 0065

In the Jammu And Kashmir High Court

Case No : Miscellaneous Application No. 452 Of 2009

Oriental Insurance Company Ltd — APPELLANT

Vs

Ashiq Hussain And Another — RESPONDENT

Date of Decision : 23-08-2023

Acts Referred:

Citation : (2023) 08 J&K CK 0065

Hon'ble Judges : Sindhu Sharma, J

Bench : Single Bench

Advocate : Amrit Sarin, Kamal Mangotra

Final Decision : Dismissed

Judgement

Sindhu Sharma, J

1. This appeal has been preferred against the award dated 15.07.2009 in File No. 262/Claim titled "Ashiq Hussain vs. Oriental Insurance Co. Ltd. and another", passed by the learned Motor Accident Claims Tribunal, Jammu (hereinafter to be referred to as "the Tribunal") whereby compensation of Rs. 1,13,750/- along with 7.5% p.a. interest was directed to be paid to respondent No. 1 from the date of filing of the claim petition till its realization.

2. A claim petition was filed by Ashiq Hussain (hereinafter to be referred to as "claimant") through his father before the Tribunal seeking compensation for the injuries suffered by him in a vehicular accident on 25.11.2006. It was averred that the claimant was standing along with some persons in Kacha Road near Forest Check Post Sidhra when the offending vehicle-Tractor being driven in rash and negligent manner hit the claimant, resulting in critically injuring him. The claimant was shifted to Government Medical College and Hospital, Jammu for treatment and suffered disability of 15% of the right upper limb.

3. Notice was issued to the parties but only the appellant contested the claim petition and filed objections. On the pleadings of the parties, the Tribunal framed

the following issues:-

i) “Whether an accident took place on 25-11-2006 near Forest check Post, bye-Pass Sidhara by rash and negligent driving of offending vehicle bearing Engine No.3102TI0E007911 and Chasis No.34510E007915 in the hands of erring driver in which petitioner Ashiq Hussain sustained grievous injuries? OPP

ii) If issue No.1 is proved in affirmative whether petitioner is entitled to the compensation if so to what amount and from whom? OPP

iii) Whether driver of the offending vehicle at the time of accident was not holding a valid and effective driving license at the time. of accident and thereby violating the terms and conditions of insurance policy ? OPR 1

iv) Whether the petitioner was traveling in the offending tractor as a gratuitous passenger, if so what is its effect on the claim petition? OPR1.

v) Relief.”

4. The claimant produced Dr. V. K. Sharma, Jhangeer and Zakir Hussain in support of his claim whereas the respondent-Insurance Company did not lead any evidence. The Tribunal after considering the evidence including the FIR and challan found that the allegations of claimant are substantiated and decided Issue No. 1 in favour of the claimant. It was held that the accident took place on 25.11.2006 due to rash and negligent driving of the offending vehicle which resulted in grievous injury to the claimant.

5. The onus of proof of Issue Nos. 3 & 4 was with the respondent/Insurance Company but it did not lead any evidence, as such, these issues were decided in favour of the claimant and against the Insurance Company. Issue Nos. 2 & 4 were also decided in favour of the claimant and compensation was awarded to the claimant.

6. Aggrieved of the same, the appellant/Insurance Company has filed the instant appeal against the award on the ground that its liability under the contract of insurance was not attracted in view of the fact that the terms & conditions of the Policy have been violated by the driver of the Tractor as the same was driven by unlicensed driver. The appellant/ Insurance Company has also challenged the award on quantum of compensation on the ground that the claimant was only 15 years of age and student of 7th class, as such, future loss of income could not have been awarded. The award of amount on the head “For Pain & Sufferings and Loss of amenities of life” has bifurcated and wrongly been awarded. It has also been stated that the claimant was travelling as gratuitous passenger and as such, he is not entitled to compensation in view of the terms and conditions of the policy.

7. The fact remains that the appellant did not lead any evidence to prove the fact that either the terms and conditions of the contract of insurance were violated or that the claimant was a gratuitous passenger. In order to avoid liability, the

appellant could have raised defence that it was not liable to pay compensation and the same had to be proved not only by pleadings but also by producing evidence to the satisfaction of the Tribunal that the insured of the vehicle has committed the breach of the terms & conditions of the Insurance Policy and also that this breach was willful.

8. The Tribunal had, in fact, framed Issue No. 3 i.e., whether the driver of the offending vehicle at the time of accident was not holding a valid and effective driving license and thereby violating the terms and conditions of Insurance Policy. Issue No. 4 was also framed i.e., whether the petitioner was traveling in the offending tractor as a gratuitous passenger and if so what is its effect. Since the appellant did not adduce any evidence on these Issue Nos. 3 & 4, therefore, the same were decided in favour of the claimant and against the appellant/ Insurance Company.

9. Admittedly, the appellant/Insurance Company did not lead any evidence with regard to the breach of the terms and conditions of the Insurance Policy and also on the issue regarding the claimant being a gratuitous passenger.

10. It is well settled that after issuing certificate of insurance, insurer is liable to indemnify the insured as not only to plead a defence but has to prove the defence taken by it. If the breach of condition of the Insurance Policy is pleaded by the insurer, insurer has also to plead that the breach has been committed by the insured.Since the appellant has failed to lead any evidence to prove these two issues, therefore, the same cannot be considered in this appeal.

11. Lastly, the appellant has questioned the quantum of compensation awarded by the Tribunal. The claimant was 15 years of age, and a student of class seventh, who suffered 15% disability at the time of accident. The appellant failed to discharge the burden of proof in this regard before the Tribunal. The Tribunal has held the claimant entitled to Rs. 33,750/- for loss of future income, Rs. 30,000/- for pain & sufferings, Rs. 30,000/- for loss of amenities of life and Rs. 20,000/- for hospitalization & medical expenses and thus, awarded compensation of Rs.1,13,750/-. The Tribunal, thus, has rightly awarded compensation to the claimant for the injuries suffered by him.

12. In view of the aforesaid facts and circumstances, the appeal is without any merit and is, accordingly dismissed.