
(2017) 02 JH CK 0211
In the Jharkhand High Court
Case No : 244 of 2013

Sajid Hussain

APPELLANT

Vs

The Union of India & others

RESPONDENT

Date of Decision : 07-02-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 279](#),
[Section 304A](#), [Section 338](#) - Rash
driving or riding on a public way - Causing death by negligence - Causing grievous
hurt by act enda

Citation : (2017) 02 JH CK 0211

Hon'ble Judges : Amitav K. Gupta

Bench : SINGLE BENCH

Advocate : Ashutosh Anand, S.K. Laik

Judgement

1. This appeal is directed against the award dated 25.04.2013 in T(M.V.) Case no. 182/2009 passed by the District Judge-IV-cum-Motor Accident Claims Tribunal, Dhanbad. 2. The claimant/appellant, Tara Devi filed the application under Section 166 of the Motor Vehicles Act, 1988 (hereinafter to be called as the Act) claiming compensation of Rs.17,22,860/- on account of the death of her husband, Late Gopal Chandra Das. It is stated that her husband along with his daughter, Mamta Kumari Das, was travelling in Tempo no. JH- 10L-2976 which dashed into a standing truck on G.T. Road, due to which her husband and daughter (respondent no.2), sustained injuries and were taken for treatment to the D.V.C hospital at Maithan. Thereafter her husband was referred to Central Hospital, Seraidhela, Dhanbad but he succumbed to the injuries. 3. On the basis of the fardbeyan of Mamta Kumari Das(Respondent no.2), Chirkunda (Maithan) P.S. Case No.140/2008 was registered under Sections 279,338 and 304A IPC and charge sheet was laid against Mohd. Sohrab Ansari, the driver of the tempo. 4. Mohd. Sohrab Ansari (respondent no.4) in the present appeal, filed his show cause admitting that he was the owner of the tempo which was validly insured with M/s United India Insurance Co. Ltd./the appellant and the insurance policy

was valid from 20.09.2007 to 19.09.2008. 5. Appellant (O.P NO.2), United India Insurance Co. Ltd., filed their written statement, admitting that the tempo was insured with them. It was asserted that a transport vehicle cannot be deemed to be validly registered under Section 39 of the Act unless a fitness certificate is granted and Section 66 of the Act stipulates that the owner is bound to have the route permit for plying the transport vehicle in any public place, failing which it shall be presumed that there is statutory violation of the conditions of the policy, as contemplated under Section 149 of the Act. It is alleged that the driver of the offending vehicle (O.P.no.1) had no valid and effective driving license on the relevant date of accident and it was incumbent for the plaintiff and owner of the vehicle to prove that the driver had a valid and effective driving license for fastening the liability to pay the compensation amount upon the insurer. It is stated that as per the FIR the tempo was carrying 10-12 passengers which was in excess and violation of the number of passengers permissible in terms of the R.C. Book leading to contravention of the terms and conditions of the policy as also the provisions of the M.V. Act. 6. On the pleadings of the parties the Tribunal framed seven (7) issues. The claimant examined three witnesses and produced the documents namely Exhibit- 1, a page of the service Book of deceased Gopal Chandra Das, containing his date of birth; Ext.2- certified copy of FIR; Ext.3- certified copy of charge sheet; Ext.4- heirship certificate; Ext.5- death certificate issued by PMCH, Dhanbad. 7. The court below on the basis of the evidence held that the deceased died on account of injuries sustained in road accident while travelling in the tempo bearing registration no. JH-10L-2976 and Mohd. Sohrab Ansari was the owner cum driver of the tempo. That the appellant (O.P. no.2) failed to establish that there was violation of the terms and conditions of the policy. The tribunal considered the date of birth of the deceased and the salary of Rs.19,470/- mentioned in Ext.1 as correct and awarded compensation of Rs.17,22,860/- with interest @ 6% minus the interim compensation from the date of the application fastening the liability on the appellant/Insurer to satisfy the award since the vehicle was validly insured with the appellant. 8. Learned counsel for the appellant has argued that the tribunal, while deciding issue no.5, had held that under Section 106 of the Evidence Act, the onus was upon the opposite party no.1 to prove that he had a valid driving license and since O.P. no.1 has failed to produce the driving license, accordingly the inference was drawn that he did not have a valid driving license. It is contended that in view of the finding of the Tribunal the liability should not have been fastened upon the appellant-Insurance Company. In support of his contention, learned counsel has relied on the decisions reported in (2004) 3 SCC 297 (para 84); (2010) 1 JCR 450 (Jhr.) and (2009) 3 JCR 351 (Jhr.) (para 5). 9. It is canvassed that there was contributory negligence of the deceased in the accident, since he was travelling in the tempo carrying 10-12 passengers which had the capacity to carry three (3) passengers as stipulated in the R/C Book. It is submitted that admittedly the tempo had dashed the standing truck, hence the owner, insurer and driver of the said truck were necessary parties hence the claim is not maintainable due to non-impleadment of the necessary parties. That the Tribunal erred in law by not

appreciating the fact that it was a case of contributory negligence. In support of the contention reliance has been placed on the decision rendered in (2008) 4 JLR 437 (para 8). 10. It is contended that the Tribunal has committed gross error in computing the compensation/award on the basis of the salary and date of birth of the deceased mentioned in Ext.1, which is merely a page of the service book, without appreciating the fact that the entire service book has not been produced by the claimants. The claimants should have produced the last pay slip of the deceased and the documents to establish that the deceased was in employment at the time of the accident. It is urged that the Tribunal has erred in considering Ext.1 as a salary certificate because such entry in the service book is not a documentary evidence of the actual salary. It is submitted that in the application under Section 140 of the Act the claimants have stated that the deceased was drawing a salary of Rs.15,948/- and in the application under Section 166, they have mentioned the salary as Rs.16,306/- subsequently an amendment was made after 2011 mentioning the salary as Rs.19,470/- It is argued by the learned counsel that such wavering statement creates a doubt regarding the actual salary drawn by the deceased. Thus, in the absence of salary certificate/pay slip, the awarded compensation is exorbitant by excessive. It is urged that the interest @ 6% from the date of application has been ordered to be paid without appreciating the fact that the case has not lingered on account of any fault or laches on the part of the appellant rather the delay occurred due to the fault of the claimant/applicant. 11. On the above grounds, it has been contended that the compensation awarded is exorbitantly excessive and the appellant should be exempted from the liability to pay the compensation because there has been violation of the terms and conditions of the policy since the owner-cum-driver failed to establish that he had a valid and effective driving license on the date of the accident. 12. Per contra, learned counsel for the respondents has contended that it is settled principle of law that for drawing adverse inference, that the driver did not have a valid license it was incumbent for the Insurance Company/appellant to have filed an application before the Tribunal seeking a direction upon the owner to produce the driving license. That since no order was passed by the Tribunal nor any application filed by the appellant-Insurance Company for production of the documents hence the question of drawing adverse inference does not arise. It is argued that the decision reported in (2009) 3 JCR, 351 (Jhr) is not applicable to the facts of this case, as would be explicitly clear that in the aforesaid decision the Insurance Company had filed a petition whereupon notice was issued to the owner of the vehicle to produce the driving license and other documents and due to non-production of the documents by the owner, the Tribunal had drawn an adverse inference, as the Insurer had examined the Investigator as a witness in support of the assertion that the driver did not have a valid license and there was breach of terms and conditions of the policy. Learned counsel for the respondent has relied on the decision in the case of Punam Devi & Anr. v. Divisional Manager, New India Assurance Co. Ltd. and ors., reported in (2004) 3 SCC 386 (paras 2 and 3) to buttress his argument. It is argued that no error has been committed

in awarding the compensation by assessing the salary at Rs.19,417/- p.m. on the basis of Ext.1. The decision in the case of Vimal Kanwar v. Kishore Dan, reported in (2013) 3 JLJR (SC) 108 (SC) has been cited by the respondents' counsel in support of the contention that when no objection or plea was raised before the Tribunal a party cannot raise such plea for the first time in the appeal. The decision reported in (2004)3 SCC 386; (2009) ACJ 401 (Supra) and the decision rendered in M.A.No. 281/2010 by order dated 05.10.2012 has also been relied upon by the learned counsel for the respondents. It is contended that just because the owner, driver and the insurer of the standing truck were not arrayed as parties the claim cannot be denied on that ground only for which reliance has been placed on the decision in the case of Yadubansh Prasad Singh v. State of Jharkhand and ors, reported in (2007) 3 JLJR 644. 13. Having heard the arguments advanced by the learned counsels, the issue which arises for determination is whether the Tribunal has committed an error in saddling the insurer with the liability to pay the awarded compensation and erred in not appreciating the fact that the owner-cum-driver of the vehicle did not have a driving license. On perusal of the decisions relied upon by the learned counsel for the appellant, it is evident that in the said cases the Insurance Company had filed a petition before the Tribunal seeking a direction upon the owner of the vehicle to produce the documents including the driving licence but the said documents were not produced despite the order of the court, where after the Insurer had examined the investigator as D.W.1, to establish the insurer's case, that the driver did not have a valid license and there was violation of terms and conditions of the policy. The facts of the case are distinguishable from the attending facts of the instant case. The facts of the case in the decision reported in (2008) 4 JLJR 437 (Mohd. Riazuddin v. Naresh Singh) is distinguishable as in the said case the deceased was repairing the standing truck which was hit by another truck due to which the deceased came under the wheels of the standing truck resulting in his death. In the instant case, as would be evident, the tempo had dashed against the standing truck and the deceased was travelling on the tempo as a passenger. It is not disputed that the deceased died due to the injuries sustained on account of the accident as the tempo turned turtle after dashing the standing truck. In such circumstance, the onus of proof lay upon the Insurance Company to establish that the owner/driver of the tempo was negligent in not adhering to the terms of the policy. The Supreme Court, in the case of National Insurance Company Ltd. v. Swaran Singh, reported in (2004) 3 SCC 297, on which reliance has been placed by the learned counsel for the appellant it has been held in para 110 (iii) as under:- "110. The summary of the findings to the various issues, as raised in these petitions, is as follows:- (i)..... (ii)..... (iii) The breach of policy condition e.g. disqualification of the driver or invalid driving license of the driver, as contained in sub-Section (2) (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against

either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time. (iv) Insurance Companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them. (v)..... (vi)....." 14. Thus, the ratio laid down in the aforesaid decision lays down that the burden to establish that the driver did not have a valid licence is upon the insurer. In the present case when the Insurer had pleaded that the driver did not have a valid license, then in such circumstance there is no plausible explanation as to why the Insurer(appellant) did not file a petition in the court seeking a direction upon the driver to produce the driving licence. The Insurer could also have filed a petition for calling a report from the District Transport authority or examined the Investigator to establish the fact that the driver did not have a valid licence for establishing the plea that there was breach of terms and conditions of the policy. The liability imposed upon the Insurance Company in terms of Section 149 (5) of the Act to satisfy the decree is the purport and object of the beneficial provisions of the Act and the right to avoid the liability in terms of Sub-Section (2) of Section 149 of the Act is in restriction and the Tribunal has the power to direct the insurer to satisfy the decree taking into account the facts and circumstances of the case. 15. It is not denied that the vehicle was insured with the appellant and once the insurance policy is admitted then the onus of proving any violation of the condition of the policy is on the insurer. The onus is on the insurer to prove that the vehicle was being driven by a person who did not have a valid license on the date of the accident as held in the case of Kamala Mangalal Vayani v. United India Insurance Co. Ltd., reported in (2010) 12 SCC 488. 16. It is evident that the deceased was not the driver rather a passenger and he cannot be held liable for contributory negligence rather this is a case of composite negligence and the choice is with the claimant to seek the compensation from the tortfeasor he selects or chooses for satisfying the claim. Moreover, such a plea should have been taken before the Tribunal and since it was not taken before the Tribunal, the Insurance Company is estopped from raising such a plea in the present appeal. 17. The contention of the learned counsel that the court below has wrongly relied on Ext.1, which is only a page of the service book for assessing the salary, is not acceptable for the simple reason that a proceeding under the Motor Vehicle Act is of a summary nature. In the case of Gayatri Devi and Anr. v. Baijnath Sahu and Anr., reported in 2009 ACJ 2146 it has been held that Section 169 of the Act lays down the power and procedure of the Tribunal. That Rule 239 of the Bihar Motor Vehicle Rules, 1992 lays down the manner of recording evidence and it does not provide that rule of evidence should be strictly applicable in the matter of claim cases which follows a summary procedure. It is noticed that Ext.1 is a page of the service book of the deceased wherein the date

of birth of the deceased is mentioned as 01.01.1956 and the last drawn salary is shown as Rs.19,417/- p.m. The said document has been admitted and marked as Ext.1, without objection, hence the appellant cannot raise this question that the Tribunal has been capricious in considering the same for computing the income of the deceased. 18. In this context it would be pertinent to notice that the Apex Court in the case of National Insurance Company Ltd. v. Indira Srivastava and Ors. reported in (2008) 2 SCC 763 has observed and held in para 19 as under:- "19. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contra distinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted." 19. As noticed the appellant has not adduced any evidence that the salary of the victim as mentioned in the service book is without deduction of income-tax but it is also pertinent to note that the claimant has also not come up with any evidence that the salary as mentioned in Ext.1, was after deduction of tax. 20. In fact the deceased was aged 52 years at the relevant time and the Tribunal has rightly applied the multiplier of 11 as per the table approved by the Hon''ble Apex Court in Sarla Verma's case. So far future prospects is concerned the Hon''ble Apex Court in Sarla Verma's Case, reported in (2009) 6 SCC 121 has held that after the age of 50 years no enhancement by way of future prospects can be considered. The Hon''ble Apex Court in the case of Rajesh v. Rajbir, reported in (2013)9 SCC 54 has allowed 15% enhancement by way of future prospects for self employed persons, however it has not altered the findings on the point of future prospects for salaried people. Hence in the facts of the present case there shall be no enhancement while considering future prospects of the deceased. 21. Therefore, the annual income of the deceased is assessed at Rs.19,470 x 12=2,33,640. In the year 2008 i.e. for the assessment year 2009-2010 the income-tax was payable @ 10% from Rs.1,50,000/- to Rs.3,00,000/- and upto income of Rs.1,50,000/- no tax was payable. Consequently the deceased would be having a liability of 10% tax on Rs.83,640/- =8364. Thus the annual income after deducting tax would be Rs.83,640 - 8364=75276+1,50,000= Rs.2,25,276/- from which 3rd is deducted towards personal expenses accordingly the annual loss to the family is calculated at Rs.1,50,184/-. Applying the multiplier of 11 to the said amount the loss of dependency is calculated at Rs.16,52,884/-. Apart from this the applicants i.e. the present respondents, would be entitled to payment under the heads hereunder as per the ratio laid down in (2013) 9 SCC 54 and 2016 SCC online SC 945:-

Funeral Expenses Rs.25,000/-

Loss of consortium Rs.1,00,000/-

Loss of guardianship, love and care to children Rs.1,00,000/-

Loss of Estate Rs.1,00,000/-

Litigation cost Rs.25,000/-

Total amount payable is Rs.16,52,024 + 3,50,000= Rs.20,02,024/- which is rounded off to Rs.20,00,000/- Thus the total compensation payable is assessed at Rs.20,00,000/- less Rs.50,000/- paid under Section 140 of the Motor Vehicles Act. Accordingly, the appellant- Insurance Company is directed to pay the compensation of Rs.19,50,000/- (Rupees Nineteen lakhs fifty thousand) with interest at the rate of 9% from the date of filing of the claim application i.e. from 21.08.2009 which is just and reasonable. 22. Accordingly, the award of the lower court is modified and enhanced to the extent as mentioned here-inabove. The appellant-Insurance Company is directed to pay the aforesaid compensation amount to the claimants within three months from the date of this order. 23. In the result, the appeal stands dismissed. 24. Liberty is reserved with the Insurance Company to file the suit for recovery of the amount from the owner/driver of the tempo, by adducing evidence that there was breach of terms and conditions of the insurance policy. Appeal Dismissed.