
(2013) 03 MP CK 0138
In the Madhya Pradesh High Court
Case No : M.A. No. 4383 of 2009

Saraswati Kushwaha

APPELLANT

Vs

Badri Singh and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

Motor Vehicles Act, 1988 — Section 147

Citation : (2013) ILR (MP) 1101

Hon'ble Judges : N.K. Mody, J

Bench : Single Bench

Advocate : Akhilesh Singh, for the Appellant; Amrit Ruprah for the Respondent
No. 3, for the Respondent

Judgement

N.K. Mody, J.—This order shall also govern disposal of M.A. Nos. 4384/09, 4385/09, 4387/09, 4388/09 filed by the appellants and also M.A. Nos. 1292/10, 1294/10, 1296/10, 1302/10 and 1303/10 filed by respondent No. 3 as in all the appeals parties are one and the same except the claimants and also the award is dated 23.7.2009 passed by MACT, Rewa, whereby various claim petitions filed by the claimants were allowed and compensation was awarded. Short facts of the case are that appellants filed a claim petition alleging that on 22.5.2006 deceased Ravendra Kushwah, Ramnaresh Kushwah, Ku. Krishna Kushwah, Ashish Kushwah and Dayaram Kushwah were travelling in the offending Marshal Jeep, which was owned by respondent No. 1, driven by respondent No. 2 rashly and negligently and insured with respondent No. 3. It was alleged that because of rash and negligent driving in all five persons, out of which three were minor, passed away. It was prayed that claim petitions be allowed and compensation be awarded. The claim petitions were contested by respondent No. 3 on various grounds including on the ground that respondent No. 3 was not liable for payment of compensation. It was alleged that offending vehicle was a private vehicle and could not be used for hire and reward. It was alleged that the accident occurred because of falling of the bridge and the Jeep fell down in the river. It was alleged that because of negligence on the part of the Government

accident took place for which appellants were already compensated by the State Government. It was prayed that claim petitions be dismissed. After framing of issues and recording of evidence learned Tribunal allowed the claim petitions and awarded the compensation against which appellants and respondent No. 3 has filed the appeals.

2. Learned counsel for appellants argued at length and submits that out of the five, three were minor namely Krishna, Ashish and Ravendra aged 10, 8 and 12 years respectively. It is submitted that in all the three cases learned Tribunal assessed the compensation to the tune of Rs. 1,80,000/- and deducted Rs. 1,00,000/- on account of ex-gratia paid to the appellants by the Government. It is submitted that amount awarded is on lower side. Similarly the deduction of the amount paid to the appellants under ex-gratia is illegal. Learned counsel further submits that in other two cases deceased were Ramnaresh & Dayaram and learned Tribunal assessed the income @ Rs...3,000/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 16 and 13 respectively. It is submitted that income assessed is on lower side and deduction towards personal expenses is on higher side and application of multiplier is on lower side. It is submitted that appeals be allowed and the amount of compensation be enhanced.

3. Learned counsel for respondent No. 3 supports the award so far as it relates to the amount is concerned. Learned counsel further submits that the offending vehicle was being driven by respondent No. 2 on whose part there was no negligence, therefore, learned Tribunal committed error in holding the respondent No. 3 liable for payment of compensation. Learned counsel further submits that since offending vehicle was private vehicle and was being used for carrying passengers in violation of terms of the policy, therefore, learned Tribunal committed error in holding the respondent No. 3 liable for payment of compensation. It is submitted that since the policy does not cover the risk of passengers for hire or reward as it was a act policy, therefore, learned Tribunal was not justified in holding respondent No. 3 liable. Learned counsel further submits that since accident occurred because of negligence on the part of the PWD, who constructed the bridge, which fell down for which the ex-gratia payment was made by the State Government, therefore, learned Tribunal committed error in holding respondent No. 3 liable. It is submitted that amount awarded is otherwise on higher side. It is submitted that appeals filed by the appellants be dismissed and appeals filed by the respondent No. 3 be allowed and the impugned award so far as it relates to respondent No. 3 is concerned, be set aside.

4. From perusal of the record it is evident that out of the five cases, three cases are of child death. Accident is of the year 2006 in the facts and circumstances in each of the cases amount is enhanced by Rs. 20,000/-.

5. So far as the appeals which are filed by the dependents of deceased Dayaram (M.A. No. 4385/09) and Ramnaresh (M.A. No. 4384/09) are concerned, it

appears that the income has been assessed @ Rs. 3,000/- per month and after deducting 1/3rd towards personal expenses multiplier of 16 has been applied. In the matter of deceased Ramnaresh a sum of Rs. 4,51,000/- was assessed, out of which Rs. 1,00,000/- was deducted on account of ex-gratia. So far as deceased Dayaram is concerned, multiplier of 13 has been applied and after deduction a sum of Rs. 2,35,000/- was awarded.

6. In the opinion of this Court, in both the cases appellants are further entitled for a sum of Rs. 50,000/- in each of the case. In the matter of Bhanwri Bai and Others Vs. Union of India (UOI) and Another, wherein ex-gratia payment was made as Rs. 5,00,000/- and compensation was assessed as Rs. 9,25,000/-, Divisional Bench of this Court has held that keeping in view the statutory provisions of the Act the amount of compensation has to be determined as per principles of the Act and the amount paid as ex-gratia cannot be deducted. Similar view has been taken by Rajasthan High Court in the matter of Rajesh Kanwar Vs. Munna Ram, 2011(1,) DMP 204 (Raj.). In view of this Court is also of the view that the learned Tribunal was not justified in deducting the amount paid to the claimants/appellants by the Government as ex-gratia.

7. So far as question of liability of respondents is concerned, undoubtedly the accident occurred because of felling down of the Bridge, at the relevant time offending vehicle was passing from pontoon bridge. There may be some fault on the part of the concerned department of the Government who has constructed the bridge. If the respondent No. 2 would have been fully conscious then the accident could have been avoided. Therefore, this Court is of the view that learned Tribunal committed no error in holding the respondent Nos. 1 & 2 liable for payment of compensation.

8. So far as liability of respondent No. 3 is concerned, submission made by Mrs. Amrit Ruprah, advocate on behalf of respondent No. 3 are in two folds, firstly since the occupants were fare paying passengers, therefore, respondent No. 3 is not liable and secondly since the policy which was issued was an act policy, therefore, also even if the risk of passenger was covered, then too, respondent No. 3 is not liable for payment of compensation for the death on account of occupants. For this contention reliance is placed on a decision in the matter of United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and Others, wherein Hon'ble Apex Court has held that risk of death or injury to gratuitous passenger carried in a private vehicle, does not cover such a risk u/s 147 of Motor Vehicles Act. Learned counsel further placed reliance on a decision in the matter of National insurance Co. Ltd. Vs. Balakrishnan passed in Civil Appeal No. 8163/12 arising out of SLP (Civil) No. 1232/12 wherein Hon'ble Apex Court has observed that act policy cannot cover a third party risk of an occupant in a car.

9. From perusal of the record it is evident that to avoid the liability respondent No. 3 has examined V.K. Pandey (Investigator) who has stated that the offending vehicle was hired by the occupants, who passed away. In his cross-examination he has stated that he was informed by Rajkumar that the vehicle was hired. The

statement of Rajkumar was not recorded by the investigator. Rajkumar was also not examined by respondent No. 3. Statement of V.K. Pandey is based on hearsay evidence, which is having no evidentiary value. Similar is the position of the statement of Dwarikaprasad Tiwari who is clerk of respondent No. 3 and has stated that the offending vehicle was insured for personal purpose, while the vehicle was being used for commercial purpose, for which no premium was charged. For proving the fact that the vehicle was being used for commercial purpose, except this, nothing is on record on the basis of which it can be said that the offending vehicle was being used for commercial purpose.

10. Coming to the second contention that the policy which was issued was an act policy, therefore, respondent No. 3 was not liable is concerned, the plea was not raised in the written statement. On the contrary the plea raised by respondent No. 3 was to the effect that photocopy of the policy which has been filed by the appellants has yet to be verified, hence it is denied that offending vehicle was insured. Similarly it was also pleaded that since the vehicle was being used for carrying passengers, therefore, respondent No. 3 was not liable for payment of compensation. Thus in the written statement it was not the case of respondent No. 3 that since it was an act policy, therefore, respondent No. 3 is not liable for payment of compensation. In evidence no cross-examination is made on the witness examined by the appellant to the effect that since it was an act policy, therefore, respondent No. 3 is not liable for payment of compensation. The investigator Mr. V.K. Pandey and the clerk of respondent No. 3 Mr. D.P. Tiwari have also not stated that because of act policy respondent No. 3 is not liable for payment of compensation. In the award passed by the learned Tribunal also the learned Tribunal has examined whether the respondent No. 3 can be exonerated on the ground that vehicle was being used for carrying passengers and the driver was not possessing valid driving license. This aspect was not examined by the learned Tribunal that whether liability can be avoided on account of act policy. In the appeal filed by the appellant no cross-objection has been filed by respondent No. 3. In absence of plea raised in the written statement, evidence and cross-objection, claim of the appellants cannot be defeated on the ground which is raised for the first time during course of arguments. Otherwise also ground raised by the respondent No. 3 has no basis. In view of this appeals filed by the appellants stand allowed. Amount enhanced as indicated above shall carry interest @ 8% P.A. Findings regarding deduction of amount on account of payment of ex-gratia stands quashed. Copy of the order be placed in the connected appeals.

No order as to costs.