(2009) 10 SHI CK 0020

In the High Court Of Himachal Pradesh

Sh. Shyam Lal and Another — APPELLANT

Vs

Smt. Surjeet Kaur and Others — RESPONDENT

Date of Decision : 22-10-2009

Acts Referred:
Motor Vehicles Act, 1988 — Section 166

Citation : (2009) 10 SHI CK 0020

Hon'ble Judges : Sanjay Karol, J

Bench : Single Bench

Judgement

Sanjay Karol, J.—The owner of the vehicle in question has assailed the award dated 9.12.2005, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P in M.A.C. Case No. 54 of 2003, titled as Smt. Surjeet Kaur and Ors. v. Sh. Shyam Lal and Ors. The challenge is limited to the findings returned by the Tribunal with respect to issue No. 4.

2. Since the controversy in issue is narrow, hence brief facts necessary for adjudication are as under.

3. The claimants, respondents No. 1 to 6 filed a petition u/s 166 of the Motor Vehicle Act, 1988 (hereinafter referred to as the Act) against the present appellants being owner and the driver of the vehicle (tempo) No. HP-12-8723 as well as against respondent No. 7 being the insurer of the vehicle. The claimants'' case, as undisputedly which has emerged from the record is that the vehicle in question was hired by one Sh. Raghunath Kaushal for the purpose of carrying the goods on the occasion of the wedding of his son Kamal Kumar. The services of Sh. Siri Ram alias Ram Kumar alias Rami alongwith one Sh. Amrik Singh were pressed by the owner of the goods for the purposes of loading and unloading of the articles and carrying them from one destination to another. On 21.4.2003 the vehicle met with an accident and the said persons engaged as labourers who were also travelling in the vehicle sustained injuries. Unfortunately Sh. Siri Ram, aged 35 years and Sh. Amrik Singh, aged 28 years died as a result of the injuries sustained in the said accident. Deceased Sh. Siri Ram left behind the claimants

being widow, the mother and four minor children. The matter was reported to the police and F.I.R. No. 100/2003 dated 21.4.2003 was registered with police station Bilaspur.

4. The petition was opposed by the owner and the driver of the vehicle inter alia on the ground that the F.I.R. had been wrongly lodged without stating the real facts of the case and the vehicle in question was taken on hire by Sh. Raghunath Kaushal who had availed the services of the deceased as labourer for the purpose of loading and unloading the goods in the vehicle.

5. The insurer while not disputing the vehicle being insured with them, disputed the liability inter alia on the ground that the deceased was travelling in the tempo as an unauthorised person i.e. gratuitous passenger at the time of the accident, as such they were not liable to indemnify the insured as material terms and conditions of the insurance policy stood breached.

6. Based on the pleadings of the parties, the Tribunal framed the following issues:

1. Whether deceased Shri Siri Ram died as a result of rash and negligent driving of respondent No. 2, driver of tempo No. HP-12-8723 ? OPP

2. In case issue No. 1 is proved, to what amount of compensation, the petitioners are entitled to and from which of respondents ? OPP

3. Whether respondent No. 2 was not having a valid and effective driving licence at the time of the accident, if so, its effect ? OPR-3

4. Whether the deceased was a gratuitous passenger as alleged? OPR-3

5. Relief.

7. Issue No. 4 was decided by the Tribunal principally by relying upon the contents of the F.I.R. Ext.PW1/D as also the Medico Legal Certificates Ext. R-5 to Ext. R-24 of the persons who allegedly sustained injuries in the accident in question. According to the Tribunal there was enough material on record to conclude that the vehicle in question had been actually engaged for the purpose of carrying 25 to 30 persons as ''Baraties'' from village Taked to village Behli and the deceased was travelling in the same as a drum-beater. As such, the deceased was travelling in the vehicle as a gratuitous passenger and thus the material terms and conditions of the insurance policy having been breached, insurer was not liable to indemnify the insured.

8. I have heard the learned Counsel for the parties and perused the record.

9. Pleadings and the defence taken by the insurer with regard to the deceased travelling as gratuitous passenger was vague, unspecific and un-substantiated.

10. The contents of the F.I.R. Ext. PW 1/D has been disputed by the appellants. The said F.I.R. has not been proved either by the author or by the Investigating Officer who had recorded the same. In fact none appeared as a witness from the police station to prove the registration of the F.I.R. or the contents thereof. In

fact record reveals that no person was cited as a witness to prove the contents thereof. The record does not even remotely suggest as to what was the outcome of the investigation of the F.I.R. and as to whether it resulted into criminal trial or not. The said F.I.R. happened to be placed on record by the claimants with the sole purpose of establishing the occurrence of the accident. The same was placed on record and exhibited by Smt. Surjeet Kaur (PW-1) widow of the deceased who admittedly had not seen the occurrence of the accident.

11. This Court in National Insurance Co. Ltd. Vs. V. Bimla Devi and Others, has held as under:

10. At the risk of reiteration, I must hold that documents which are not ''public documents'' cannot be allowed to be brought in evidence nor can any reliance be placed upon them either by the court or any party unless they are appropriately and properly proved and brought into evidence through witnesses in accordance with well established principles of evidence law.

12. Hence in the absence of the F.I.R. being proved in accordance with law, the contents thereof, particularly when the same were in dispute cannot be said to have been proved and used against the persons disputing correctness of the same.

13. For the very same reason the Medico Legal Certificates Ext. R5 to Ext. R-24 cannot be looked into for the purpose of deciding the issue in question. These documents were simply placed on record by the learned Counsel for the insurer as is evident from the record of the proceedings dated 23.11.2005. No witness was examined to even prima facie show that these Medico Legal Certificates pertained to such persons who allegedly sustained injuries in the motor vehicle accident in question.

14. Thus the Court below has seriously erred in correctly appreciating the material on record while arriving at a conclusion which is just and fair. The findings returned by the Tribunal are not only erroneous but illegal and are unsustainable.

15. Dr. Lalit Sharma, learned Counsel for the insurer has invited my attention to a decision rendered by the Apex Court in National Insurance Co. Ltd. Vs. Rattani and Others, while contending that the F.I.R. placed on record by the claimants can be looked into for the purpose of deciding the issue. I am afraid the ratio of law laid down in the said decision cannot be pressed in the instant facts as in that case the Court was dealing with the case where the claimant who had not only referred to but had also relied upon the contents of the F.I.R. and had pleaded the same to be part of the claim petition. In these facts the Apex Court held that the claimant could not be permitted to dispute the contents thereof subsequently. It is in this background that the Court held that if the facts are admitted or, if otherwise, sufficient materials exists on record so as to enable a court to arrive at a definite conclusion, it would be idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence

to establish that the deceased and the injured passengers were gratuitous passengers.

16. In the instant case as has been discussed above, there is nothing to show that the facts are either admitted or that the court could arrive at a definite conclusion with regard to particular facts having been proved in accordance with law.

17. The Apex Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, has held as under:

The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed u/s 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence 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 licence 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) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer u/s 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

18. The burden to prove the issue and the fact that the insurer is not liable to indemnify the insured is thus heavy on the insurer. In the instant case, undisputedly and admittedly no evidence was led by the insurer. In this view of the matter, it cannot be said that the insurer had discharged the burden successfully so as to absolve itself from the liability under the law and in terms of the insurance policy Ext. R-1.

19. The question which needs to be considered however is as to whether there is any other material on record from which it can be even inferred that the deceased was travelling as a gratuitous passenger.

20. Smt. Surjeet Kaur, widow of the deceased as PW-1 has deposed that her husband had been engaged as a labourer for the purpose of loading and unloading of the goods in the vehicle. Undisputedly in the said accident both the deceased as also the owner of the goods who had hired the vehicle for the purpose of carrying the same had died. The findings of the Tribunal to the effect that the owner of the vehicle had failed to examine the owner of the goods are thus perverse and erroneous as a dead person could not have been examined. The Tribunal totally lost sight of the fact that Sh. Kamal Kumar son of the owner of the goods had in fact examined himself as RW-1. From his testimony, it is evident that the vehicle in question had been hired for the purpose of carrying the goods and that the deceased had also been engaged for the purpose of loading and unloading of the goods.

21. For the aforesaid reasons, the findings returned by the Tribunal on the said issue being erroneous and illegal are set aside. Keeping in view the insurance policy Ext. R-1 it cannot be said that the insurer is not liable to indemnify the insured. Hence, the appellants cannot be directed to pay the amount under the award and the insurance company i.e. respondent No. 7 with whom the vehicle was insured is directed to pay the amount.

22. No other point urged. The insurer is directed to immediately pay the amount to the claimants which unfortunately has not been paid to them till date inspite of the fact that the accident took place in the year 2003. The impugned award is modified accordingly.

CMP No. 386 of 2007

23. Not pressed at this stage. Disposed of as such.