

(2014) 08 SHI CK 0031

In the High Court Of Himachal Pradesh

Case No : FAO Nos. 129, 130, 157, 158 of 2012, 269 of 2014 and 4236 of 2013

Shriram General Insurance Company Limited

APPELLANT

Vs

Asha Devi
 Varinder Vs Darshna Devi

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 8
Criminal Procedure Code, 1973 (CrPC) — Section 173, 173(2)
Motor Vehicles Act, 1988 — Section 166, 2(21), 2(23), 2(47)
Penal Code, 1860 (IPC) — Section 279, 304-A, 337, 338

Citation : (2014) 4 ACC 385 : (2015) ACJ 2203 : (2016) 1 AnWR 39 : (2014) 3 ShimLC 1593

Hon'ble Judges : Mansoor Ahmad Mir, C.J

Bench : Single Bench

Advocate : Vijay Chaudhary, Jagdish Thakur and Virender Thakur Advocates, Advocate for the Appellant; Raman Jamalta, Virender Thakur, Jagdish Thakur and Vijay Chaudhary, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Mansoor Ahmad Mir, C.J.—FAOs No. 129, 158 of 2012 and 269 of 2014 are directed against the award, dated 16th March, 2012, made by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 34 of 2010, titled as Darshana Devi & others versus Charanjeet & others, whereby compensation to the tune of Rs. 4,75,800/- with interest @ 9% per annum from the date of filing of the petition till its final realization came to be awarded in favour of the claimants and against the respondents, i.e. the driver, the owner-insured and the insurer (hereinafter referred to as "the impugned award-I").

2. The driver, namely Shri Varinder, has questioned the impugned award-I by the medium of FAO No. 129 of 2012; the insurer by the medium of FAO No. 158 of 2012 and the owner, namely Shri Charanjeet, has questioned the same by the medium of FAO No. 269 of 2014, on the grounds taken in the respective memo

of appeals.

3. FAOs No. 130, 157 of 2012 and 4236 of 2013 have been preferred against the award, dated 16th March, 2012, made by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 35 of 2010, titled as Asha Devi & others versus Charanjeet & others, whereby compensation to the tune of Rs. 2,00,000/- with interest @ 9% per annum from the date of filing of the petition till its final realization came to be awarded in favour of the claimants and against the respondents, i.e. the driver, the owner-insured and the insurer (hereinafter referred to as "the impugned award-II").

4. The driver, namely Shri Varinder, has questioned the impugned award-II by the medium of FAO No. 130 of 2012; the insurer by the medium of FAO No. 157 of 2012 and the owner, namely Shri Charanjeet, has questioned the same by the medium of FAO No. 4236 of 2013, on the grounds taken in the respective memo of appeals.

5. The claimants have not questioned both impugned awards on any count, thus, have attained finality so far it relate to them.

6. Both the impugned awards are outcome of a motor vehicular accident, which was caused on 22nd October, 2010, by the driver, namely Shri Varinder, while driving the offending vehicle, i.e. the tipper, bearing registration No. HP-34 A-6379, rashly and negligently near Kais Monastery, could not control the same, which rolled down; deceased, namely Shri Mani Ram @ Nanu and Shri Sanni @ Kalu, who were working as labourers with the said tipper, sustained injuries and succumbed to the injuries. The legal representatives/dependents of both the deceased have claimed compensation by the medium of Claim Petitions No. 34 and 35 of 2010, came to be decided by the Tribunal vide impugned award-I and impugned award-II, dated 16th March, 2012.

7. All the six appeals are outcome of the said vehicular/traffic accident and the disputes raised are interlinked. Thus, I deem it proper to determine all these appeals by a common judgment.

8. The claimants have claimed compensation to the tune of Rs. 15,00,000/- and Rs. 10,00,000/- in Claim Petitions No. 34 and 35 of 2010, respectively, as per the break-ups given in the respective claim petitions, on the ground that the deceased were working as labourers with the offending tipper, sustained injuries and succumbed to the injuries because of the rash and negligent driving of the driver of the offending tipper and have lost their source of dependency, are hapless and helpless.

9. The owner-insured, the driver and the insurer have resisted the claim petitions on the grounds taken in the respective memo of objections.

10. The Tribunal, on the pleadings of the parties, framed seven issues, which are common, though separately, in both the claim petitions. Therefore, it is apt to

reproduce the issues framed in Claim Petition No. 34 of 2010 herein:

"1. Whether Sh. Sanny alias Kalu died in an accident on account of rash or negligent driving of respondent No. 2? OPP

2. If issue No. 1 is proved in affirmative, to what amount and at what rate of interest the petitioners are entitled for compensation? OPP

3. Whether respondent No. 3 is liable to make the payment of awarded amount as indemnifier? OPP

4. Whether the petition is not maintainable? OPR-3

5. Whether the vehicle in question was driven in breach of terms and conditions of insurance policy? OPR

6. Whether petitioners are not the legal heirs of deceased Sanny alias Kalu? OPR

7. Relief."

11. The claimants have examined witnesses in both the claim petitions. In Claim Petition No. 34 of 2010, the claimants have examined HC Ram Krishan as PW-1; one of the claimants, namely Smt. Darshana Devi, appeared in the witness box as PW-2 and have placed on record copy of FIR as Ext. PW-1/A, affidavit as Ex. PW-2/A, copy of identity card as Ext. PW-2/B and photograph as Ext. PW-2/C. The insurer has not examined any witness. The driver has examined Sh. Narayan Singh as RW-1; the owner-insured, namely Shri Charanjeet Singh, has appeared in the witness box as RW-2 and has placed on record copy of RC as Ext. R-1, copy of insurance policy as Ext. R-2 and copy of driving licence as Ext. RW-1/A.

12. In Claim Petition No. 35 of 2010, the claimants have examined HC Ram Krishan as PW-1, Dr. Mahesh Kapoor as PW-2; one of the claimants, namely Smt. Asha Devi, appeared in the witness box as PW-3 and have placed on record copy of FIR as Ext. PW-1/A & copy of post mortem report as Ext. PW-2/A. The insurer has not led any evidence in this claim petition. The driver has examined Smt. Ashita Bodh as RW-1 and has placed on record copy of driving licence as Ext. RW-1/A. The owner-insured has examined Smt. Asha Rani as RW-2; the owner-insured has appeared in the witness box as RW-3 and has placed on record copy of school certificate as Ext. RW-2/A, copy of RC as Ext. RW-3/A, copy of insurance policy as Ext. RW-3/B, copy of route permit as Ext. RW-3/C and copy of final report of investigation as Ext. R-3.

13. The Tribunal, after examining the evidence in both the claim petitions, passed, on the same date, but two separate awards and held the claimants entitled to compensation, as discussed hereinabove, saddled the owner-insured and the driver with liability in equal shares but directed the insurer to satisfy the award at the first instance with a right to recover the same from the driver and the owner-insured.

Issue No. 1:

14. In all the appeals, the adequacy of amount of compensation and rashness and negligence of the driver of the offending tipper are not in dispute. However, I have examined the record. Shri Narayan Singh, Criminal Ahlmad from the office of CJM, Lahaul and Spiti at Kullu, has appeared as RW-1 in Claim Petition No. 34 of 2010 and stated that case titled as State versus Varinder Anand is pending against the driver-Varinder in the Court. Thus, there is clinching evidence on the file that the offending vehicle was driven by its driver rashly and negligently. Accordingly, the findings recorded by the Tribunal on issue No. 1 are upheld.

15. I deem it proper to determine issues No. 3 and 5 before I deal with issues No. 2, 4 and 6.

Issues No. 3 and 5:

16. Issues No. 3 and 5 are interlinked, thus, are taken up together for determination.

17. The claimants have specifically averred in para 9 of Claim Petition No. 34 of 2010 that the deceased was travelling in the offending vehicle-tipper has labourer. The owner-insured and the driver have filed replies and have not denied the said fact and have stated that the averments contained in para 9 of the claim petition need no reply. In Claim Petition No. 35 of 2010 also, it has been averred by the claimants that the deceased was employed by the owner-insured with the offending vehicle-tipper. The said averments have not specifically been denied by the owner-insured and the driver, thus, stand admitted by them in terms of Order VIII of the CPC (hereinafter referred to as "the CPC").

18. However, the owner-insured, Shri Charanjit, has appeared in the witness box and his statement was recorded in both the claim petitions. In his examination-in-chief, he has not made even a single whisper about the said fact and even has not stated that they were not the labourers, rather, has remained silent. In the cross-examination conducted by learned counsel for the insurer and the claimants, he has stated that the driver was having the licence; was competent to drive the offending vehicle and he has checked the same before he employed the driver. He has also stated that the vehicle was insured and its seating capacity was 1 + 2. The insurer has not led any evidence. Thus, the insurer has failed to prove that the driver was not having effective and valid driving licence and the owner-insured has committed breach of terms and conditions of the insurance policy.

19. The plea of gratuitous passenger was neither raised by the insurer nor any issue was framed. The insurer has also not proved that the deceased were travelling in the offending vehicle-tipper as gratuitous passengers. How the Tribunal came to the conclusion that the deceased were gratuitous passengers, is not forthcoming. The Tribunal has also not discussed how it came to the conclusion that the deceased were gratuitous passengers.

20. It was for the insurer to plead and prove that the deceased were gratuitous

passengers. This Court in FAO No. 362 of 2012, titled ICICI Lombard General Insurance Company versus Sumitra Devi and others, in terms of the judgment rendered by the Apex Court in a case titled National Insurance Co. Ltd. Vs. Swaran Singh and Others, , held that the insurer has to plead and prove that the deceased was a gratuitous passenger, which it has failed to do so. It is apt to reproduce relevant portion of para 105 of the judgment rendered in Swaran Singh's case (supra), herein:

"105.

(i)

(ii)

(iii)

(iv) The insurance company are, 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 wherefore would be on them."

21. In a bunch of cases, FAO No. 169 of 2011 being the lead case, titled Shanti Devi versus National Insurance Company & others decided on 25th July, 2014, this Court also took the same view and held that the Insurance Company has to prove that deceased was travelling in the vehicle as a gratuitous passenger.

22. The Tribunal has held that the driver was having the valid and effective driving licence. Even otherwise, neither such dispute was raised nor such issue was framed. However, learned counsel for the parties have admitted before the Tribunal that the driver was having valid and effective driving licence to drive the offending vehicle-tipper. It is also not the case of the insurer that the cause of the accident was that the driver was having driving licence to drive one kind of vehicle and was driving another kind of vehicle at the relevant point of time.

23. I have gone through the record. A bare perusal of the record do disclose that the FIR was lodged against the driver of the offending vehicle-tipper, investigation was conducted, statements of witnesses were recorded in terms of the mandate of Section 173 of the Code of Criminal Procedure (hereinafter referred to as "the CrPC") and final report was filed before the Court of competent jurisdiction under Sections 279, 337, 304-A and 338 of the Indian Penal Code (hereinafter referred to as "the IPC"). The report in terms of Section 173(2) of the CrPC contains all the details of the investigation, which is part of the Tribunal record in Claim Petition No. 34 of 2010 as Ext. R-3/A.

24. No challan was presented against the driver of the offending vehicle-tipper on the ground that he was not having the effective and valid licence in terms of the MV Act. Thus, it can be safely held that the driver of the offending vehicle-tipper has not committed any offence which is punishable under MV Act.

25. In terms of registration certificate, Ext. R-1 in Claim Petition No. 34 of 2010

and Ext. RW-3/A in Claim Petition No. 35 of 2010, the offending vehicle was "medium goods vehicle" and its unladen weight was 3495 kilograms, thus, falls within the definition of "light motor vehicle".

26. It is apt to reproduce definition of "light motor vehicle" and medium goods vehicle" as given in Section 2(21) of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") herein:

"2.

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms."

27. It provides that a "light motor vehicle" includes a "transport vehicle". It is apt to reproduce the definition of "transport vehicle" as given in Section 2(47) of the MV Act herein:

"2.....

(47) "transport vehicle" means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle."

28. It provides that a transport vehicle includes a goods carriage also and medium goods vehicle means any goods carriage other than light motor vehicle, as discussed hereinabove.

29. Section 2(23) of the MV Act contains the definition of "medium goods vehicle", which reads as under:

"2.

(23) "medium goods vehicle" means any goods carriage other than a light motor vehicle or a heavy goods vehicle."

30. A goods carriage, the unladen weight of which is less than 7500 kilograms, falls within the definition of "light motor vehicle" and the goods carriage, the unladen weight of which is more than 7500 kilograms, falls within the definition of "medium goods vehicle".

31. While going through the registration certificate of the offending vehicle-tipper, the unladen weight of the vehicle is given as 3495 kilograms. Thus, it falls within the definition of "light motor vehicle".

32. However, be that as it is, it is not the case of the insurer or there is no evidence on the file that the driver was not having effective and valid driving licence and the cause of the accident was because he was having licence to drive light motor vehicle, but was found driving another kind of vehicle, as discussed hereinabove.

33. Thus, the Tribunal has fallen in error in holding that the deceased were

gratuitous passengers and the owner-insured has committed breach and has wrongly saddled the owner-insured and the driver with liability.

34. Viewed thus, the Tribunal has wrongly decided issues No. 3 and 5. Accordingly, the findings returned by the Tribunal on issues No. 3 and 5 are set aside; it is held that the owner-insured has not committed any breach and the insurer has to indemnify.

Issue No. 4:

35. The Tribunal, after scanning the evidence, held that the claim petitions, on the face of it, are maintainable. The said issues were not pressed by the learned counsel for the insurer and accordingly, were decided in favour of the claimants. However, I have gone through the record. The claimants being the victims of the motor vehicular accident filed claim petitions in terms of Section 166 of the MV Act for grant of compensation. Thus, the claim petitions are maintainable. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 6:

36. The claimants are the legal representatives of the deceased, thus were within their rights to file claim petitions. Hence, the findings returned by the Tribunal on issue No. 6 are upheld.

Issue No. 2:

37. The Tribunal, after examining the pleadings and the evidence, oral as well as documentary, held that the claimants have lost their source of dependency and after applying the multiplier method held that the claimants are entitled to compensation to the tune of Rs. 4,75,800/- and Rs. 2,00,000/- with interest @ 9% per annum from the date of filing of the claim petitions till its realization in Claim Petition No. 34 of 2010 and Claim Petition No. 35 of 2010, respectively, which is not excessive in any way. However, the same appears to be meager, but the claimants have not questioned the same, accordingly, the same is upheld.

38. Accordingly, the appeals filed by the insurer, being FAOs No. 157 and 158 of 2012, are dismissed and the appeals filed by the owner-insured, being FAOs No. 4236 of 2013 and 269 of 2014, and the appeals filed by the driver, being FAOs No. 129 and 130 of 2012, are allowed. The insurer is saddled with liability. The impugned awards are accordingly modified.

39. The Registry is directed to release the awarded amount deposited by the insurer in favour of the claimants strictly as per the terms and conditions contained in the impugned awards with a further direction to release the amount deposited by the owner-insured before this Registry in FAOs No. 4236 of 2013 and 269 of 2014 through payee's account cheque.

40. All the appeals are disposed of, as indicated hereinabove, alongwith all pending applications.

41. Send down the records after placing copy of the judgment on each of the files.