

(2010) 07 AHC CK 0495
In the Allahabad High Court
Case No : F.A.F.O. No. 556 of 2004

Smt. Urtnila Devi Bajpai and Another	APPELLANT
Vs	
Ram Ratan and Others	RESPONDENT

Date of Decision : 14-07-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 166, 173

Citation : (2010) 4 AWC 4092

Hon'ble Judges : Yogesh Chandra Gupta, J;Devi Prasad Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Yogesh Chandra Gupta, J.—Heard Mr. Anurag Shukla, learned Counsel for the appellants and Mr. S.S. Rajawat, holding brief for Mr. D.K. Mishra, learned Counsel for the claimant-respondents. Mr. Narvind Kumar Singh also appears for the claimant-respondents.

Present appeal u/s 173 of the Motor Vehicles Act has been preferred against the impugned award dated 31.8.2004, passed by the Motor Accident Claims Tribunal/ Addl. District and Sessions Judge, Court No. 1, Hardoi in M.A.C.P. No. 21 of 2001.

2. Brief facts giving rise to the present appeal is that one Sarvesh was working as helper in vehicle D.C.M. Bearing No. U.P. 30A/4139. The vehicle was engaged to carry Parag milk. On 4.1.2001 at about 11.30 p.m., the vehicle was carrying milk to Hardoi and when it reached near the culvert of cry anpurwa, police station Sandi being driven rashly and negligently became dis-balanced and dashed against a tree. Sarvesh and Arun suffered grievous injuries as a result of dash. The driver ran away from the spot. Sarvesh was admitted in the hospital and ultimately succumbed to the injuries.

3. The claimant-respondents have approached the Tribunal by preferring a claim petition u/s 166 of the Motor Vehicles Act. The Tribunal framed seven issues which are as under:

1. Whether on 1.2001 at about 11.30 p.m. in the night near culvert before village Gyanpurwa died in an accident caused by vehicle D.C.M. U.P. 30A/4139 due to rash and negligent driving of the vehicle by into driver? If so, its effect?

2. Whether the offending vehicle was not driven in accordance with the terms and conditions of the Insurance Policy ? If so its effect ?

3. Whether the driver of the offending vehicle had not valid driving licence at the time of accident ? If so its effect ?

4. Whether the motor accident claims petition is not maintainable in this Court ? If so. its effect ?

5. To what relief, if any and from whom, the petitioners are entitled ?

6. Petitioners stated its story in brief and examined himself as A.P.W. 1 and Rajeev Singh, record keeper, police office, Hardoi as A.P.W.-2 and closed its evidence O.Ps. In their defence. Parties have filed some papers in support of their claims.

7. I have gone through the entire evidence on record and heard the learned Counsel for the parties at length.

4. The Tribunal on the basis of the evidence led by the parties recorded a finding that the accident did occurred on the aforesaid date, time and place in which Sarvesh suffered grievous injuries and later on succumbed to it while undergoing treatment in the hospital. The Tribunal also recorded a finding that the offending vehicle was driven following the terms and conditions of the insurance policy and the driver was having valid licence at the time of accident.

5. However, while deciding the liability, the Tribunal recorded a finding that the appellants owner are also responsible to share the liability to the extent of Rs. 70,000. The only reason assigned in the impugned award is that the owner and driver of the vehicle have not cross-examined the witnesses despite having opportunity given to them. It shall be appropriate to reproduce relevant portion from the impugned award:

Since the O.P's 1 and 2 did not cross-examine the witnesses despite having an opportunity and they did not contest the case, hence they are also liable to pay reasonable amount of compensation to the petitioners. Accordingly, it is justified that Rs. 70,000 be paid by the Opp. Parties 1 and 2 and the remaining amount of compensation, i.e., 1,00,000 be paid by the National Insurance Company, O.P. No. 3.

6. Thus, a plain reading of the impugned award shows that the liability has been fastened on the appellants only because they did not cross-examine the witnesses. The finding recorded by the Tribunal fastening the liability only on the ground that the appellants have not cross-examined the witnesses does not seem to be sustainable. The Tribunal should have recorded a finding with regard to contributory negligence on the part of the driver and only thereafter liability

could have been fastened on the owner or the driver of the vehicle.

7. Learned Counsel for the respondents defended the impugned award stating that the driver was not having driving licence. It has been further submitted that since the appellants have not cross-examined the witnesses, rightly they have been held liable to pay an amount of Rs. 70,000. The submission of the respondents' counsel does not seem to be sustainable because of the fact that they have not filed any cross appeal or appeal against the impugned appeal. Hence, the finding recorded by the Tribunal seems to attain finality to the extent it relates to appreciation of facts on record with regard to driving licence etc.

8. In a case *National Insurance Co. Limited v. Swaran Singh and Ors.* 2004 SCC (Cri) 733 : 2004 (2) AWC 1589 (SC), their Lordships of Hon"ble Supreme Court while interpreting the provisions of Section 149 of the Act observed that once the insurance is proved and the terms and conditions are followed, then the burden shall shift on the insurance company to establish that the case falls under exception to save from its liability to discharge its obligation. To absolve the insurance company, it is necessary that either the evidence on record should establish that it is a case of contributory negligence or there was breach of licence.

9. In the present case, attention of this Court has not been invited to any evidence on record which may indicate that the accident occurred because of certain fault on the part of the driver of the vehicle involved. Attention has also not been invited with regard to breach of terms and conditions of the licence. Though learned Counsel for the respondents has submitted that the driver was not having the driving licence but that too without following the cross-examination on the point and leading evidence, it is not open for argument.

10. In the case of *Swaran Singh (supra)*, Hon"ble Supreme Court observed as under:

The proposition of law is no longer *res integra* that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability.

11. In para 74 of the Judgment (*supra*), Hon"ble Supreme Court has referred the conditions to fasten liability on the insurance company. It has been observed that the insurance company has got statutory liability to satisfy the decree. For convenience, para 74 of the judgment (*supra*) is reproduced as under:

In *Halsbury's Laws of England*, Fourth Edition Reissue, Volume 25, it is stated:

749. Judgments required to be satisfied. The first condition of the obligation of the insurers to pay on a Judgment is that there is a judgment.

The Second condition is that the judgment must be in respect of a liability which

is required to be covered by compulsory insurance. In other words, the only person who can maintain a right of action direct against the insurers is a person falling within the class of third parties whose bodily injury or death or damage to whose property is required to be covered by a motor policy.

The third condition is that the liability is, in fact, covered by the terms of the policy, or would be covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy. For this purpose, conditions declared to be invalid as against a third party are ignored, but if, even after ignoring all such conditions, the relevant use of the vehicle puts it outside the scope of the policy, the insurers are left immune. The most important clause in this connection is the "description of use" clause. The assured is criminally liable if he uses his car for purposes outside the scope of his insurance and, in addition to his criminal liability, he has to bear unaided the cost of compensating third parties injured by his use if he is negligent. Subject to the statutory provision rendering certain conditions invalid against third parties, the insurers are not obliged to carry a wider scope of liability than they have agreed by their policy to carry.

The fourth condition is that the judgment must be against a person insured by the policy. This language covers a permitted driver as well as the person by whom the policy has been effected.

12. In view of above, since from the evidence on record, there has been breach of conditions, the entire liability should be borne by the insurance company and not by the appellants, owner and drivers. The burden of statutory liability lying on the shoulder of the insurance company cannot be shifted unless the exception with regard to contributory negligence is proved by adducing trustworthy evidence.

13. In the present case, attention of the Court has not been invited to any material on record which may establish that the insurance company has led evidence to establish the ground with regard to contributory negligence.

14. In view of above, the appeal is allowed. The impugned award dated 31.8.2004 stands modified holding the respondent-insurance company to pay the entire decretal amount/compensation to the claimant respondents. The Tribunal shall proceed accordingly. The amount deposited in this Court shall be remitted to the Tribunal and the appellants shall be entitled for refund of amount, if any.