

(2008) 08 DEL CK 0149
In the Delhi High Court
Case No : MAC Appeal No. 338 of 2008

Sushil Kumar

APPELLANT

Vs

Prem Pal, Smt. Ramwati, Md. Amdadullah and The Oriental
Insurance Co. Ltd.

RESPONDENT

Date of Decision : 06-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, Order 9 Rule 13
Limitation Act, 1963 — Section 5
Motor Vehicles Act, 1988 — Section 173

Citation : (2008) 08 DEL CK 0149

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Pradeep Kumar Arya, for the Appellant; Abhinav Ramkrishna, for R-4, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—The present appeal has been filed u/s 173 of the Motor Vehicles Act, 1988 (for short as "Act") against the award dated 23rd August, 2006 and order dated 24th January, 2008 passed by MACT whereby the rights of recovery against the insured owner has been granted to the Insurance Company.

2. The brief facts of this case are that on 4th July, 2002, the deceased Bunti, aged, about 15 years old was going to take milk from Ram Chand Dairy with his elder brother Sanjay on scooter No. DL-3S-F-6259. The deceased was driving the scooter and at about 6.30 p.m. when the scooter reached the Tajpur mines, NTPC Gate No. 3, the offending vehicle RTV bus Bearing No. DL-1V-8288 came from the front side in a rash and negligent manner and at a high speed and struck against the deceased from the front side as a result of which the deceased fell down on the road and the offending vehicle ran over the deceased and dragged his body. The driver of the offending vehicle ran away from the spot. The brother of the deceased Sanjay received grievous injuries and FIR regarding

this accident was lodged with the Police Station Badarpur. It is alleged that the accident was caused due to the negligence on the part of the bus driver, Md. Amdadullah, respondent No. 3 herein, who was the driver of the offending vehicle under the employment of Sh. Sushil Kumar, the appellant herein, and the vehicle was insured with Oriental Insurance Company/respondent No. 4, herein.

3. Before the trial court, the claim petition was contested by the driver as well as the Insurance Company.

4. However, the defence of the driver was struck off vide order dated 22nd July, 2004 for his omission to file written statement which was restored on 30th November, 2004 subject to cost. In the written statement filed by the driver, the factum of accident has been denied and he also generally denied the other contents of the petition.

5. Learned counsel for the owner of the offending vehicle appeared before the trial court on 13th November, 2003 and sought time for filing of the written statement.

6. The Insurance Company in its written statement admitted the factum of Insurance Company and stated that the same was issued in the name of the appellant. Insurance Company contested the claim petition inter-alia on the ground that the insured i.e. the appellant has contravened the terms and conditions mentioned in the Insurance policy and thus it cannot be called upon to indemnify the insured in case of any award.

7. On 17th December, 2003, the owner of the offending vehicle appeared in person in the Court and stated that the driving licence is a valid one. He was directed to produce a certificate to this effect from the concerned Transport Authority and was given time to file written statement.

8. On the next date i.e. on 22nd July, 2004, none appeared for the owner of the offending vehicle nor any written statement was filed and accordingly the owner was proceeded Ex-Parte by the Tribunal.

9. Vide award dated 23rd August, 2006, the trial court granted a compensation of Rs. 2,40,000/- in all to the claimants i.e. respondents No. 1 and 2 herein.

10. After passing of the award, on 21st February, 2007, the appellant moved an application under Order 9 Rule 13 CPC for setting aside the Ex-parte decree passed by the trial court on 23rd August, 2006. Along with that, an application u/s 5 of Limitation Act for condonation of delay was also filed.

11. Vide order dated 24th January, 2008, application under Order 9 Rule 13 CPC was dismissed by the trial court.

12. It has been contended by learned Counsel for the appellant that the burden of proof to prove that the driver of the offending vehicle was not having a valid driving licence was upon the Insurance Company and the Insurance Company has failed to discharge this burden and has failed to establish this fact that the

driver of the alleged offending vehicle was not having a valid driving licence at the time of the accident.

13. It is further contended that as per statement of R3W1, who is an official of the Insurance Company, as per the investigation report, the driver, Md. Amdadullah was not having driving licence.

14. This report of the investigator was not proved at all by the Insurance Company in accordance with law, since the investigator was not examined nor any one from Firozabad Transport Authority, to prove this fact that no driving licence was issued in the name of Md. Amdadullah.

15. It is further contended that no notice under Order 12 Rule 8 CPC for production of the driving licence was ever issued to the appellant or to the driver by the Insurance Company, as required under the law.

16. Lastly, it is contended that the appellant has shown sufficient reason for not participating in the trial and application under Order 9 Rule 13 CPC was justified and reasoned application which ought to have been allowed to do justice between the parties.

17. On the other hand, it has been contended by learned Counsel for respondent No. 4 that there is no infirmity in the order passed by the Tribunal and the driver in this case was not having a valid driving licence on the date of accident and as such the present appeal is not maintainable.

18. It is clearly borne out from the record that the appellant had been duly served before the trial court and after service he had put in his appearance through his counsel and thereafter, he has sought time for filing the written statement as well as for producing a certificate to the effect from the concerned Transport Authority that the driver had a valid driving licence.

19. On 22nd July, 2004, the appellant did not appear before the trial court and thus was proceeded Ex-parte.

20. There is nothing on record to show that thereafter till date when the impugned judgment was passed on 23rd August, 2006, the appellant ever appeared before the trial court.

21. The driver of the offending vehicle in spite of various opportunities, did not file the written statement and as such vide order dated 22nd July, 2004 passed by the trial court, the defence of the driver was struck off.

22. Application under Order 9 Rule 13 CPC was filed on 21st February, 2007, i.e. about six months after the impugned award has been passed by the Tribunal, and thus this application was hopelessly time barred.

23. The ground taken in this application was that the appellant had serious health problems and was bed ridden from April, 2004 to December, 2006 and was thus not able to participate in the proceedings and for the same reason

could not produce on record the driving licence of the respondent which had been lying with him.

24. Dealing with application under Order 9 Rule 13 CPC, the Tribunal vide its order dated 24th January, 2008, held;

The petitioner has also placed on record a medical certificate purported to have been issued by Dr. Verma Ved P stating that the petitioner remained under his treatment from 1st January, 2004 to 1st December, 2006 for post hepetic neuralgia and was on rest for the above period. It is pertinent to mention here that the doctor has not prescribed any rest in his prescription slips for the period from 1st May, 2004 to 11th October, 2004. The applicant has also not placed on record any treatment papers for period from December, 2004 to December, 2006 to prove the continuity of treatment. In the absence of the documents, the certificate dated 5th December, 2006 does not inspire confidence. Even otherwise from the record it is revealed that the applicant had appeared in the court after receipt of the notice of the claim petition. He was also represented through counsel Shri. Naveen Arya who filed his vakalatnama for respondent No. 1 and on 13th November, 2003, and also informed the court that the driving licence of respondent No. 1 was valid. He was also told to produce the certificate to that effect from the concerned transport authority. He was proceeded Ex-parte on 22nd July, 2004 for his non-appearance and failure to file the written statement. There is also no explanation as to why the counsel for respondent No. 2 had not been appearing. The personal appearance of respondent No. 2 was not required for the purpose of production of valid licence or a certificate from the concerned transport authority. The same could have been produced by the counsel or any other person in the family of the applicant. It is not the case of the applicant that there was no other member in his family to produce the certificate from the transport authority/valid driving licence in the court or he was unrepresented during the proceedings. The applicant has not filed such certificate from the concerned authority or the copy of valid driving licence of respondent No. 1 even along with the application.

In view of above discussion, I do not find any merits in the application. The same is hereby dismissed.

25. Moreover, there is no explanation as to why counsel for the appellant did not appear in the trial court on 22nd July, 2004, and thereafter, when admittedly, appellant had engaged the counsel to defend his case.

26. Under these circumstances, I do not find any infirmity with the order dated 24th January, 2008 vide which the learned trial court has dismissed the application under Order 9 Rule 13 CPC filed by the appellant and as such the appeal with regard to the application, under Order 9 Rule 13 CPC is not maintainable.

27. Now, coming to the merits of the appeal, the appeal is hopelessly time barred, as the impugned judgment was passed by the trial court on 23rd August,

2006, while the appeal has been filed on 11th March, 2008. No sufficient cause has been shown by the appellant for this inordinate delay in filing the appeal.

28. The defence of the appellant is that the driver of the offending vehicle was having a valid driving licence which was lying with him i.e. the appellant.

29. The appellant admittedly, did not place or prove that driving licence before the trial court and further the driver has not appeared in the witness box to deny the factum of the accident.

30. In this regard, the relevant findings of the Tribunal read as under;

From the record it is also revealed that on 17th December, 2003, respondent No. 2 was present in person and stated that driving licence of respondent No. 1 was valid and he may also produce a certificate to this effect from the Transport Authority concerned. Respondent No. 2, however, did not appear after 17th December, 2003 and was proceeded Ex-parte on 22nd July, 2004.

From the conduct of respondent No. 2 also, it can be assumed that he had the knowledge that licence of the driver was fake. Respondent No. 3 however, is not exonerated from its liability, being joint and several with respondent No. 1 and 2 on the ground of fake licence of the driver. Being the insurer, respondent No. 3 is directed to deposit the award amount within a period of one month in favour of the petitioners. Respondent No. 3, however, can get the compensation amount indemnified from respondent No. 1.

31. Coming to the question of rash and negligent driving on the part of driver of offending vehicle, the Tribunal has dealt with it in its judgment in para No. 6 and relevant findings read as under;

PW 2, the eye witness, has testified that on 4th July, 2002 at 6.30 p.m., when he along with his deceased brother was going to take milk from Ram Chander dairy on their scooter, the offending vehicle RTV bus bearing No. DL-IV-8288 came from the front side in the most rash and negligent manner, which was being driven at a high speed and struck against his scooter, as a result, he along with his brother fell down on the road and the offending vehicle ran over the deceased and dragged his body. Although, learned Counsel for respondent No. 1 has suggested that the deceased was coming from the wrong side which lead to head on collision, the suggestion has been specifically denied by PW- 2. Even otherwise, the defence introduced by learned Counsel for respondent No. 1 at the stage of evidence cannot be looked into because in the written statement no such averment has been made. It may also be indicated here that respondent No. 1 has not been examined in defence to explain the circumstances in which the accident had occurred.

32. I do not find any ambiguity or error in these findings of the Tribunal. Moreover, the driver of offending vehicle has not appeared in the witness box to rebut the claimant's case. As such adverse inference has to be drawn against the driver of offending vehicle.

33. As far as the quantum of compensation awarded in this case is concerned, the deceased was 15 years at the time of accident and he was not earning anything. In view of the second schedule of the Act, his notional income has been assessed as Rs. 15,000/- per annum and a multiplier of 15 has been adopted.

34. The trial court has placed reliance on the judgment of the Apex Court in *Manju Devi v. Musafir Paswan and Anr.* 2005 ACJ [1999].

35. Lastly, this plea of the learned Counsel for the appellant that notice under Order 12 Rule 8 CPC was required to be served upon the appellant and the driver of the offending vehicle, does not hold any ground, since the appellant as well as driver had appeared in person/through counsel initially, in the trial court but later on they absented and were proceeded ex-parte. Under these circumstances, no notice under Order 12 Rule 8 CPC was required to be served, either upon the appellant or driver of the offending vehicle.

36. Thus, the compensation awarded by the learned Tribunal is based on sound reasoning and principles. The same is just, fair and equitable and I do not find any infirmity in the impugned orders passed by the learned Tribunal.

37. The present appeal, under these circumstances is not maintainable and the same is hereby dismissed with costs.

38. Appellant is directed to deposit the costs of Rs. 5,000/- with the Delhi High Court Legal Services Committee within a period of four weeks from today, failing which the Registrar General shall recover the same in accordance with law.

39. List on 15th September, 2008 for compliance.