(2006) 08 PAT CK 0068

In the Patna High Court

Case No : Misc. Appeal No. 207 of 2002

The Divisional Manager, New India Assurance Co. Ltd. and Another — APPELLANT

Vs

Most. Sabitri Devi and Others — RESPONDENT

Date of Decision : 25-08-2006

Acts Referred:

Citation : (2006) 08 PAT CK 0068

Judgement

J.N. Bhatt, C.J.—The appellant New India Assurance Co. Ltd. has questioned the legality and validity of the common and composite judgment dated 7th February, 2002 and award dated 20th February, 2002, passed in M.A.C.T. Case Nos. 41 and 42 by Shri Amresh Kumar Lal, 6th Additional District Judge-cum-Motor Accident Claims Tribunal, Chapra in respect of two claim petitions under the Motor Vehicles Act, 1988 (hereinafter called the "Act"), arising out of a road accident in which two persons lost their lives.

2. The Accident Claims Tribunal, Chapra, awarded an amount of Rs. 2,22,000/- by way of compensation to the heirs of the first deceased namely, Hari Shankar Sharma, with interest at the rate of 9% whereas the same Tribunal awarded an amount of Rs. 2,10,000/- with the same rate of interest at 9% to the heirs of the second deceased, namely, Birendra Sharma, from the date of the application, thus giving rise to two appeals.

3. At the time of admission, upon joint request, the two appeals were consolidated and heard together finally by calling the records and proceedings from the Claims Tribunal concerned on merits.

4. Learned Advocates for the parties have offered their submissions which are considered along with the relevant factual matrix, as well as, material legal settings of the Act.

5. The accident in question took place on 15.5.1998. On the unfateful day, deceased Hari Kishore Sharma was driving the motor bike and one Birendra

Sharma was sitting on the pillion along with one another Jamadar Pandey. Thus, three persons were travelling on the motorcycle on Chapra-Masrakh Pitch Road at around 12 noon. A private travelling bus bearing registration No. BR 1P 8391 dashed against the motorcycle near village Bahrauli, as a result of which the motorcyclist, as well as, two pillion riders were thrown of the motorcycle. The motorcyclist and his brother who was sitting on the pillion sustained fatal injuries, whereas another person sustained personal injuries.

6. The heirs and legal representatives of the deceased motorcyclist and his brother filed the above mentioned two claim petitions. While in the claim petition filed on behalf of the heirs and legal representative of deceased Hari Shankar Sharma, claim of an amount of Rs. 600000/-(six lacs) has been made in M.A.C.T. Case No. 41 of 1998, the heirs and legal representatives of deceased Birendra Sharma have made a claim for Rs. 5.00.000/- (five lacs) in M.A.C.T. Case No. 42 of 1998 for the rash and neligent driving on the part of the driver of the private tourist bus. The bus driver was also prosecuted for the rash and negligent driving. However, there is nothing on the record to show as to what happened to the criminal case.

7. Contention of the heirs and legal representative of the deceased was that deceased Hari Kishore Sharma, at the relevant time, was earning around Rs. 3000/- per month, whereas deceased Birendra Sharma was earning Rs. 3500 per month.

8. The owner and the insurer of the bus in question appeared. They filed written statements but no evidence was led by them. An application was filed by the insurer u/s 170 of the Motor Vehicles Act, 1988 (hereinafter called the Act) for permission to question the liability on the ground of the driver of the bus having fake licence but it appears that no attempt was made by the insurance company to obtain the order of the Tribunal on that application for the permission to question the above on the ground other than the grounds mentioned u/s 149(2) of the Act.

9. Upon consideration of the facts and circumstances, the Tribunal finding that the driver of the bus was rash and negligent and responsible for happening of the accident which took the life of two young people, passed awards in both the claim petitions, as aforesaid.

10. The original respondent Insurance Company of the bus - appellant New India Assurance Company Limited has come up in these two appeals questioning the impugned awards of the Tribunal.

11. Learned Counsel for the respondent original petitioners supported the impugned award. The learned Counsel for the insurer-appellant has strongly submitted that the Insurance Company cannot be fastened with the liability to pay the compensation.

12. Learned Counsel for the appellant Insurance Company has raised following

contentions:

(i) that the driver of the private passenger bus was though holding the licence but it was fake and, therefore, the insurance company is not liable to pay compensation;

(ii) that the amount awarded in both the claim cases is excessive and the Tribunal has committed error in assessment of the damages;

(iii) that there is non-joinder of necessary parties, namely, the Insurance Company of the Motorcycle and the driver of the private passenger bus.

13. The aforesaid three contentions have been countenanced by the learned Counsels for the original petitioners-respondents herein.

14. Upon consideration of the facts and circumstances, relevant propositon of law and the evidence on record, all the three contentions advanced on behalf of the Insurance Company are not acceptable for the reasons mentioned hereinafter.

15. Since all the aforesaid points are interconnected, they are being considered and being dealt with and decided simultaneously. There is no doubt in the mind of this Court that now it is well settled proposition of law in tort that the driver of the offending vehicle is not a necessary party. Though he is one of the tort feasors and is liable for payment of the compensation, he is not the necessary party. The owner-insured of the offending vehicle has been impleaded as party and he has been held liable along with the Insurance Company for the payment of the compensation of both the awards. This finding of the Tribunal could not be said to be in any way vulnerable . It may also be mentioned that so far as the point of impleading the driver of the offending bus and the Insurance Company of the motorcycle as party is concerned, they are also not necessary party as no claim is raised against them. Otherwise also, let it be mentioned that in the realm of law of tort, it is the choice of the victim or the heirs of the deceased victim of a road accident to select the tort feasor. Therefore, the impugned awards cannot be faulted with on the ground that they suffer from non-joinder of party, namely, driver of the offending bus, as well as, the Insurance Company of the motorcyclist on which the deceased were travelling at the relevant time.

16. It will now lead to the consideration as to whether the contention with regard to holding of fake licence, as alleged by the Insurance Company, is acceptable or not ? In this connection, it may be mentioned that there is no material on record to suggest, even remotely, that the driving licence held by the driver of the offending bus was fake. Merely raising of a plea is not enough. The Insurance Company raised the plea of fake licence held by the driver of the offending bus, but such plea was not, seriously, attempted to be proved. Even no serious effort was made to lead evidence in this regard before the Tribunal. Mere production of one certificate, without proof, is of no avail. It leads nowhere. No Insurance company can be absolved from the liability of payment of compensation under the law of tort merely by raising a plea. Raising of a plea is a part of the pleading

which has to be proved by leading evidence. More so, when such a plea goes to the root of the liability for payment of the compensation, it ought to have been proved to the satisfaction of the Court. Therefore, this contention must also fail.

17. It will also be interesting to note that even if the licence is held to be fake, according to the latest proposition of law. Insurance Company cannot be permitted to avoid in to make a loss good in terms of the award recorded by the Tribunal under the Act.

18. So far as the liability in regard to third party claims is concerned, the Tribunal can decide the liability of the insurer in such a situation like one on hand even though plea of fake licence or no licence at all has been raised. So inter se liability between the insurer and the insured can be decided by the Tribunal which has not been decided in the present case. Probably, there might not be a request for that. Since it is not dealt with and not decided, the presumption would be that no such request has been made before the Tribunal. But in any way, the original claimant cannot stand deprived of reimbursement of the awarded amount by the appellant Insurance Company as the Insurance Company has, otherwise, also right to initiate a proceeding for the reimbursement from its insured. So on either count, this contention also does not help the Insurance company so far as the satisfaction of the award is concerned.

19. So far as the challenge against the amount of quantification of damage as made by the Tribunal on merits, is concerned, strictly speaking, the appellant Insurance Company cannot be allowed to raise this issue as no order had been solicited or obtained on the application presented before the Tribunal in terms of the provisions of Section 170 of the Act. Mere presentation of an application and not pressing it at the time of leading evidence or raising such a point, cannot help the Insurance Company in so far as the merit of the award is concerned.

20. Notwithstanding the fact that the Insurance Company was also heard on the quantification of damages so as to avoid future complication and multiplication of litigation, the amount awarded in both the claim petitions, upon correct assessment and analysis of the evidence on record, could not be said to be, in any way, excessive or unreasonable or perverse requiring interference by this Court in appeal. In both the cases, structural formula in terms of the provisions of Section 163A of the Act has been adopted by the Tribunal. Both the deceased persons were young. They were earning their livelihood and were bread winners of the family. This Court is also satisfied, alternatively, that the amount of compensation awarded could not be questioned and cannot be faulted. Therefore, alternatively, also the contention regarding quantification of the damages of both the appellants raised by the appellants Insurance Company must fail.

21. It would be material at this stage to have a peep into the relevant legal settings. So far as the legal propositions are concerned, in these two appeals, we are concerned with the provisions of Section 149(2), 163A, 166, 170 and 173 of

the Act These provisions are examined and considered. Section 149(2) of the Act relates to the special defence available to the Insurance Company against its liability with regard to the breach of specified conditions of the policy. Section 149(2) of the Act reads hereunder:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risk. - (1)

X X X X X X X (2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court of, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

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22. As observed above in the foregoing paragraphs, the plea which the appellant Insurance Company advanced with the help of Sub-section (2) of Section 149 of the Act is that the driver of the offending private passenger bus was though holding a licence, but not a valid one, as it was fake. On the assessment of the evidence, it is noticed that this ground probably is raised for the sake of raising, as no attempt has been made to prove it. It is, absolutely, necessary, to get

absolved from the payment of liability to make demand of amount of compensation or reimbursement to the victim of the road accident on account of liability of the insured owner of the vehicle which has the dominant purpose to pay the third party claims under the Act.

23. Let it be also mentioned that according to the settled proposition of law, it is also incumbent upon the Insurance Company to prove the breach of the policy condition as it is raised in this case, to the satisfaction of the Tribunal for absolving of its liability. The breach of the policy condition like disqualification of the driver or invalid driving licence of the driver or plea of fake or invalid driving licence or disqualification of the driver for driving the vehicle on the relevant time are not, in themselves defences available to the Insurance Company 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 all the conditions of the policy of the Insurance Company regarding use of vehicles by a duly licensed driver or one who was disqualified to drive at the relevant time. Insurance companies with a view to avoid their liability must not only establish the defence raised but must also establish breach on the part of the owner of the vehicle by proving it in accordance with law and it has to be shown to the satisfaction of the Tribunal concerned that even the insurer was in know of the disqualification of the driver which is raised in the instant case, to avoid the liability. This proposition is amply explicit and succinctly explored by the Hon''ble Apex Court in a decision in the case of National Insurance Co. Ltd. Vs. Swaran Singh and Others, . In this three-Judge Bench decision very relevant and material observations are made in paragraph 91,92,98,99,107, and 110 of the report. From the proposition propounded in the National Insurance Co. Ltd (supra), the Insurance company is unable to make any profit out of the contentions raised in these appeals.

24. Section 170 of the Act leaves no manner of doubt that in order to question the award on merit on the ground other than the defence as mentioned in Sub-section (2) of 149 of the Act, it is required to satisfy the Tribunal about the conditions mentioned in Section 170 of the Act. This proposition is also very well established and as such it requires no any case law to be mentioned. However, the latest decision on this point may be mentioned in as in the case of National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, which fully supports and reinforces the aforesaid proposition which is dealt with by this Court.

25. It is unfortunate that instead of making serious attempt to prove the plea raised by the insurance Company, an attempt has been made to thwart the liability to avoid payment of compensation to the unfortunate victims or their dependents of the road mishap. Be that as it may, the aforesaid contentions raised on behalf of the appellant Insurance Company are without any substance and merit. Therefore, both the appeals preferred against the impugned award and composite judgment of the Tribunal must fail. Accordingly, these appeals

shall stand dismissed with costs.

26. Let it be mentioned that, unfortunately, no amount of compensation is paid by the Insurance company so far, except the statutory liability under the no fault liability provisions, as well as, liability u/s 173(2) of the Act. Therefore, this Court is left with no alternative but to direct the appellant Insurance company in both the cases to deposit the remaining amount out of the awarded amount before the tribunal within a period of six weeks with interest and costs. The Registry of this Court is directed to transmit the amount of deposit made by the appellant Insurance company to the tribunal concerned.

27. Before parting, the Tribunal is directed to make disbursement of the amount after due verification of the original claims who are heirs and legal representatives of the unfortunate victim of the road accident in question in such a way that the full amount is not paid to the claimants as most of the claimants cannot expect to exercise physical discipline as required and again money in hand is always sensitive to be spent. The underlying object and design of the - Act has been to see that the victim and the legal representative of the deceased victim of the road accident are placed in the same status to the extent as far as possible, and in the same financial position in which they would been, had there been no road accident and the bread winner of the family had not died. In absence of other schemes or provisions in the Act, the lumps sum amount, by utilisation of the multiplier or structural formula, is being awarded by way of damages to pay compensation which, otherwise, would have been enjoyed by the heirs and legal representatives of the victims for the spreaded span of life. It is, therefore, not only necessary but also incumbent upon the Tribunal to see that certain facts and consideration including their educational background and other requirements etc are taken into consideration for making disbursement . The peculiar judicial responsibility in such a situation under the Act does not come to an end as it is in case of a civil dispute. The role of the Tribunal is like the role of loco parentis and the tribunal has to disburse the amount keeping in mind that the amount of compensation is utilized properly, appropriately, and expediently and not frittered.

28. In this connection the direction contained in the decision of the Hon''ble Apex Court in the case of Lilaben Udesing Gohel, Shyamala Shashidharan Nayyar and Others, Pramilaben Narendra Bhai Patel and Others, Ramabhai Shankarbhai Chavda, Lilaben and Others, Kantaben Anil Kumar Patel and Others, Motor Vahan Durghatna Sanghthan, Nadiad and Others and Shardaben Chandubhai Patel and Others Vs. Oriental Insurance Company Ltd. and Others, Hemraj Loduram Rajpur and Another, Nandubhai Ambalal Thakkar and Others, Ganibhai Ambabhai Vora and Another, Kaji Gulam Nabi Sheikh and Others, Gujarat State Road Transport Corpn. and Others, State of Gujarat and Others and Bachusha Dadusha and Others, ought to be taken into consideration. The Tribunal is directed to pass the order of disbursement, upon request being made, keeping in mind the guidelines mentioned herein before.

