
(2013) 11 MP CK 0085

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 1189.2006

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Mahila Kalawati and Others

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2013) 11 MP CK 0085

Hon'ble Judges : M.K. Mudgal, J

Bench : Single Bench

Advocate : N.S. Tomar, for the Appellant; Pradeep Jain, Advocate for Respondents no. 1 to 6, for the Respondent

Final Decision : Allowed

Judgement

M.K. Mudgal, J.—Challenging the validity and legality of the award dated 10.10.2006 passed by MACT, Shivpuri in Claim case No. 94 of 2006, the appellant Insurance Company has filed this appeal u/s 173(1) of the Motor Vehicles Act. By the impugned award, the Claims Tribunal after rejecting the permission sought by the appellant for defending the case on all grounds u/s 170 of the Motor Vehicle Act, has awarded a total sum of Rs. 4,20,000/- with interest to the claimants for the death of one Kashiram Jatav 30 years of Age who died in vehicle accident on 2.6.2005 and also held that the appellant insurance company is liable to pay the compensation awarded. In this appeal, the appellant insurance company is referred to as "non-applicant no. 3", respondents no. 1 to 6 as "applicants/claimants" and respondents no. 7 and 8 as "non-applicants no. 1 and 2". The admitted facts of the case are that on 2.6.2005 the date of accident, the offending truck bearing registration No. M.P.09-K.D/2735 was owned by the non-applicant no. 2 Dinesh Kumar and it was insured with appellant/non-applicant no. 3 Insurance Company.

2. The facts in brief of this case are that on the date of incident 2.6.2005 at 12-00 in the night the deceased Kashiram about 30 years of age met with an accident near AB Road Shivpuri with Truck bearing registration No. M.P.09-

K.D/2735 driven by the non-applicant no. 1 rashly and negligently while Kashiram was going to the house of his relative situated at Thakurpura Shivpuri, owing to which, Kashiram suffered severe injuries in different parts of his body leading to his death. Hence, the legal representatives of the deceased filed the claim petition before the claims Tribunal for the compensation of Rs. 25,95,000/-.

3. The non-applicants no. 1 and 2 denying the averments made in the claim petition have submitted that no accident had occurred with the offending truck being driven by non applicant no. 1 and owned by non applicant no. 2 and even if it is found that the accident had occurred with the alleged vehicle, the driver/non-applicant no. 1 was having valid driving licence, hence, the respondents cannot be held responsible for payment of any compensation to the claimants. Hence, the claim petition filed by the claimants deserves to be dismissed. Further if any compensation is awarded by the claims Tribunal, the same is to be paid by the non-applicant no. 3 Insurance Company.

4. Similarly, non-applicant no. 3 denying the allegations made in the claim petition has submitted that in the instant case, the driver was not possessing valid driving licence. Moreover, the accident was caused by the unknown vehicle, hence, the applicants have no locus-standi to file the claim petition against the alleged vehicle truck No. MP09-KD/2735. Further, the claim made by the applicants for monetary loss caused to them owing to the death of deceased Kashiram was also denied being disproportionate. Even it has been submitted that the non-applicants no. 1 and 2 are not co-operating with the insurance company which reflects that they are hands in glove with the applicants. Hence, the insurance company is not liable to pay any compensation and consequently, the claim petition filed by the claimants deserves to be rejected.

5. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal after assessing income of the deceased at Rs. 3000/- per month and applying the multiplier of 17 and holding that he was spending 1/3rd on himself as personal expenses by impugned award partly allowed the claim petition filed by the claimants as stated supra and awarded a sum of Rs. 4,20,000/-, the breakup of which is as follows:-

Rs. 4,08,000/- Towards loss of dependency.

Rs. 5,000/-. Towards loss of consortium;

Rs. 3,000/- Towards funeral;

Rs. 4,000/- Towards loss of Estate.

6. In this appeal, the appellant insurance company has mainly challenged the award on the ground of involvement of the Truck bearing registration No. No. MP09-KD/2735 in the alleged accident. Hence, the question that arises for consideration is whether the said truck was involved in the alleged accident causing death of deceased Kashiram Jatav.

7. Learned counsel for the appellant submits that the finding recorded in para 7 to 10 in the impugned award by the learned Tribunal regarding involvement of the said truck in the alleged accident are not based on proper reasonings and appreciation of the evidence. The claimants have examined three witnesses in this case, out of them, Kalawati (PW1) widow of the deceased and Chironji (PW2) are not eye witnesses of the accident. Only Ramesh Chandra (PW3) has deposed in his statement regarding the accident claiming himself to be an eye witness of the said accident but his statement is not credible as no report was lodged by him in the police station. Counsel further submits that presence of the said witness at the site of the accident is also doubtful as the time of accident was 12-00 in the night. The counsel further submits that witness Ramesh Chandra being relative of the deceased has been made eye witness in this case. As per para 5 of his statement, during investigation his statement was recorded after one and half months of the incident. If he had been eye witness of the accident, his statement would have been recorded promptly by the police without any delay.

8. Counsel further submits that the report Ex. P/2 was lodged by Balkishan Ojha on the same date at the police station Shivpuri. In the said report, the accident has not been alleged to have been occurred by the truck bearing No. MP09-KD/2735. On the contrary, the report has been made against an unknown vehicle. The alleged truck was seized after six months of the incident by the police. Statement of Balkishan has not been got recorded by the claimants. Besides, the statement of investigating officer has also not been got recorded by the claimants. It could have been clarified by the statement of I.O. as to on what basis, he seized the truck after six months of the accident. Learned counsel further argued that though, non-applicant has not produced any evidence in rebuttal of the claimants' evidence yet, the claimants have utterly failed to prove that the said truck had been involved in the said accident. The learned counsel further urged that an application u/s 170 of the Motor Vehicle Act was filed by the appellant for seeking the permission for defending the case on all grounds, but the said application was rejected vide order dated 26.6.2006 arbitrarily without properly construing the provisions of Section 170 of Motor Vehicle Act as the insurance company was made party in the case as non-applicant no. 3, owing to which, the permission was not required. In spite of this fact, the application was rejected. To bolster his submissions, the learned counsel has relied upon the following judgments:

United India Insurance Company Ltd. Vs. Shila Datta and Others, , Oriental Insurance Co. Ltd. Vs. Premlata Shukla and Others, and National Insurance Company Ltd. Vs. Meghji Naran Soratiya and Others, ,

9. Controverting the statements made on behalf of the appellant, learned counsel for the respondents submits that the finding recorded by learned claims tribunal are based on proper reasoning as the Ramesh Chandra is the eye witness of the incident. By relying on his statement, learned claims Tribunal has arrived at the

conclusion that the accident had occurred with the said truck bearing No. MP09-KD/2735. Besides, no sufficient reason has been found to interfere with the finding recorded by the Tribunal. The learned counsel for the respondents has relied upon the following judgments:

Jujhar Singh Rajput Vs. Omprakash Malviya and Others MACD 2013 (2) (MP) 690, National Insurance Co. Ltd. Vs. Smt. Sita Devi and Another MACD 2013 (2) (Raj.) 695, Daulatram and others Vs. Akhlesh Kumar and Others 2006 (III) MPWN 39, Nandan Tiwari Vs. Virendra Kumar and Others, and Shalini and Others Vs. Harbhajan and Others, .

10. Heard the arguments of both the parties and perused the record.

11. In order to prove their case, the claimants have produced three witnesses namely Smt. Kalawati (PW1) widow of the deceased, Chironji (PW2) and Rameshchandra (PW3). The witness Kalawati (PW1) deposing in para 1 and 2 of her statement has stated that her husband had gone to village Khubat along with his brother Dhani Ram who came back but her husband Kashiram did not. When Dhani Ram was asked about Kastiram's whereabouts by her, he replied that Kashiram had stayed back with his relatives at Thakurpura. The witness has further deposed that when her husband did not return for some time, she went to Thakurpura to inquire about him. There she was told that her husband had gone from the village i.e. Thakurpura. After returning from Thakurpura, she went to Shivpuri Kotwali after four or five days where, she came to know that her husband met with an accident and she was informed by the police that the dead body of her husband had been cremated and when clothes and shoes of her husband were shown to her, she identified them as her husband's. It is evident here that she was not present at the time of accident. Further, in this regard, another witness Chironji (PW2) too has not deposed anything about the accident. Thus, it becomes clear that the statement of both the witnesses (PW1) and (PW2) do not signify any relevance regarding the involvement of the alleged truck in the said accident as they are not eye witnesses to the accident.

12. The witness Ramesh Chandra (PW3) claiming himself to be the eye witness of the said accident has deposed in his statement that on 2.6.2005 at about 12 midnight, he was returning from Kolaras to Shivpuri by a jeep after dropping some passengers. When he arrived two kilometers before the Thakurpura, he saw a truck bearing No. M.P.09 K.D.2735 which was going ahead his jeep dashed a person and moved forward. The witness has further stated that he stopped his jeep for a while and saw that the person who was dashed by the said truck was dead. Thereafter, he pursued the truck but could not catch it, however, he noticed the number of the said truck. In para 2 of his statement, the witness has stated that he informed the Kotwali Shivpuri police next day regarding the offending truck. During the cross-examination in para 3 of the statement, it has come on record that the jeep the number of which was M.P.08/D/1647 belongs to his neighbour Ramesh. The witness (PW3) has admitted in para 3 and 5 of his statement that he did not lodge any report to the police regarding the accident.

13. In this connection, the FIR Ex. P/2 was lodged at the police station Shivpuri by Balkishan Ojha at about 1.15 Am on 2.6.2005. The said report does not bear the alleged truck number rather it is about an unknown vehicle. Moreover, the statement of Balkishan Ojha was not got recorded by the claimants. Had his statement been recorded, it would have made it clear about the details of the accident and the very presence of the (PW3) at the site of the accident. Although, the FIR Ex. P/3 has not been proved by the non-applicant yet it can be taken into account for consideration in this case as it has been produced and relied upon by the claimants. In this regard, para 13 and 14 of the Hon''ble Supreme Court's judgment in Oriental Insurance Co. Ltd. Vs. Premlata Shukla and Others, is worth mentioning.

14. The statement of (PW3) that he had informed the police next day is also not found credible as if he had informed the police his statement would have been recorded on the next day of the accident whereas it was not done so. On the contrary, the witness (PW3) has admitted in para 5 of his statement that his statement was recorded by the police nearly one and half months of the accident. The very silence of witness (PW3) for one and half months creates suspicion about his very presence on the spot at 12 in the night as he remained quite about the said accident and did not disclose any facts to the police for one and half months. Besides, the witness has further stated in para 1 of his statement that he was returning from Kolaras to Shivpuri in the night of the accident after having dropped a few passengers whereas, on the contrary in para 4 of his statement, the witness (PW3) has stated that he was working as a labour in Mandi and on the day of said accident, he had returned at 6.00 PM. The witness belongs to the village Thakurpura, thus, it is strange that when he had reached home at 6.00 PM, how, he happened to come by jeep from Kolaras to Shivpuri at midnight and witnessed the accident.

15. The very presence of the witness on the spot could have been believed if the statement of the driver of the said jeep had been got recorded. Moreover, the witness (PW3) has deposed in para 5 of his statement that the accident took place right in front of "Pandit Hotel". To believe the statement of witness (PW3) the statement of the owner or any worker of the said hotel would have endorsed the truth to his statement and the occurrence of the said accident as well as the very presence of witness (PW3) at the site of the accident but it was not done. It is beyond understanding as to why the evidence of the natural witness has been concealed. Hence, no such circumstance come on the record so as to believe the very presence of the said witness at the site of the accident and his having witnessed the accident. His statement as a witness in the case after a long period of one and half month also creates suspicion that there is a strong possibility of his being introduced as a false witness in the case as the witness (PW3) is by caste Jatav and the deceased too was from the same caste as per para 6 of the statement of (PW3). As per the statement of widow of the deceased, her husband had gone to village Thakurpura to his relative. In view of the above facts and circumstances, it appears that the witness (PW3) suppressing his

relationship with the family of the deceased has allowed himself to be drafted as an eye witness of the accident so as to benefit the claimants. As per seizure memo Ex. P/4, the said truck was seized after six months on 17.12.2005. If the witness (PW3) had informed the police about the offending vehicle and its number as per para 5 of his statement on next day of the accident, the said truck could have been seized much earlier but delayed seizure of the truck after a period of six months gives rise to a doubt that said truck has been deliberately got involved in the accident so as to get the claim from the insurance company. Moreover, in the instant case, the statement of the investigating officer was also very important to clarify as to how he got the number of the said truck and how the said truck was seized after six months of the accident, whereas, the report was lodged in the police station about an unknown vehicle that caused the said accident but his statement was not got recorded.

16. The learned claims Tribunal has committed an error in believing the statement of the witness (PW3) as an eye witness without taking into account the aforesaid facts and circumstances as discussed earlier. Thus, the said findings deserve to be set-aside as the claimants have utterly failed to prove the involvement of the said truck in the accident causing the death of the deceased.

17. Now, the pertinent question that crops up here is that whether the appellant/insurance company has any right to challenge the award on the ground of the involvement of the vehicle except in a breach of policy laid down in section 147 and section 149(2) of the Motor Vehicle Act.

18. On perusal of the record, it becomes clear that an application u/s 170 of the Motor Vehicle Act for seeking the permission to contest the case on all grounds filed on 16.5.2006 by the appellant/insurance company stating that the owner and the driver of the said truck were not assisting the insurance company and possibly appear to have colluded with the claimants owing to which, the insurance company be permitted to contest the case on all grounds. The said application was neither responded by the claimants nor by the owner and driver of the said truck. However, the said application was turned down vide order dated 26.6.2006 assigning the reason that the defence is being made effectively by the non-applicant no. 1 and 2 i.e. the owner and driver of the said truck. The rejection of the said application on the reason given for it does not seem to be convincing and appropriate as the owner and driver of the said truck did not appear before the claims tribunal for getting their statements recorded and rebutting the story put-forth by the claimants. The cross-examination conducted on their behalf also appears to be of formal in nature. Under the said circumstances, the apprehension of the insurance company regarding the connivance between the claimants and the non-applicants no. 1 and 2 i.e. owner and driver about the involvement of the said truck was not baseless. Although the validity and propriety of the said order i.e. 26.6.2006 was not challenged by the appellant/insurance company at the time of the passing of the order, yet the legality and propriety of the said order may be challenged in this appeal. The

division bench of this Court in the case of Oriental Insurance Co. Ltd. Vs. Manisha Chaturvedi and Others, of the said judgment, has held that while deciding the appeal against the final award, the Court can look into the correctness of the order passed by the Tribunal with respect to rejection of the prayer to raise the defence u/s 170 of the Act. The said view has been endorsed by the Division Bench of this Court in the case of National Insurance Co. Ltd. Vs. Kusma Devi and Others, . In para 10, it has been held as under:

10. So far as challenge to the order dated 31.10.2002 rejecting the permission to defend is concerned, said order is an interim order and it is well settled principle of law that all the interim orders passed in the matter can be challenged with the final judgment. Hence, the order dated 31.10.2002 which is in the nature of interlocutory order, can certainly be challenged at the time of challenging the award on merits.

In this regard, the judgment of The Oriental Insurance Co. Ltd. Vs. Smt. Usha Goel and Others, is also worth mentioning.

19. As regards the collusion, the verdict of the Hon''ble Apex Court in para 7 of the judgment in National Insurance Company Ltd. Vs. Meghji Naran Soratiya and Others, has been given as under:

7. There is a prevalent view that a rethink on sections 149 and 170 of the Act is necessary. As noticed above, section 149 contemplates claim petitions being filed only against the driver and the owner, and the driver/owner alone contesting the claim on merits. The insurer is required to satisfy the award made by the Tribunal, even if it is not impleaded as a party to the claim proceedings. But in practice, the insurer is invariably made a party to the claim proceedings, presumably to avoid any kind of delay. It is also a reality that drivers who are primarily liable seldom contest the proceedings either because of their financial incapacity or because they know that the burden will be borne vicariously by the owner and by the insurer under the policy of insurance. It is also a reality that many of the owners do not appear and contest the claim proceeding, or even if they appear and file a reply, do not defend the claim by effectively cross-examining the claimant's witnesses and by leading defence evidence. Owners are complacent as they have an insurance cover and know that the insurer will bear the liability. In practice, therefore, the insurer has to keep on goading the owner to contest the matter and place necessary evidence. Section 170 provides that if the driver/owner fail to contest the claim, the Tribunal may permit the insurer to contest the claim. But what, if the driver/owner file a reply but fail to effectively participate in the proceedings? What if the counsel for driver/owner are present but resort to only cursory cross-examination? What if the driver/owner do not at all lead defence evidence? What if there is a well planned collusion that does not meet the eye? Where the insurer does not get permission u/s 170, there is a reasonable chance of the defence to the claim being far from satisfactory. Judicial notice can also be taken of the fact that there have been several false claims by the claimants in collusion with the owners/drivers of

vehicle and/or police and/or doctors. The question raised is whether it is proper to prohibit the insurer, which is to bear the liability statutorily and contractually, from participating in the process of adjudication of liability and assessment of compensation? Or the statute having made the insurer directly liable to the claimants, should the insurer be given a direct right to contest the claim on merits without the technical requirement of permission? Should the insurer always be at the mercy of the owner to contest the claim? There's are matters that invite serious consideration, particularly by Parliament and Law Commission and other stakeholders. Be that as it may.

20. In para 9, 10 and 11 of the Supreme Court's judgment in *United India Insurance Co. Ltd. Vs. Shila Datta and Others* (Supra) regarding the propriety of section 170 of the Motor Vehicle Act, it has been held as under:

9. The Act does not require the claimants to implead the insurer as a party respondent. But if the claimants choose to implead the insurer as a party, not being a noticee u/s 149(2), the insurer can urge all grounds and not necessarily the limited grounds mentioned in section 149(2) of the Act. If the insurer is already a respondent (having been impleaded as a party respondent), it need not seek the permission of the Tribunal u/s 170 of the Act to raise grounds other than those mentioned in section 149(2) of the Act. The entire scheme and structure of Chapters XI and XII is that the claimant files a claim petition only against the owner and driver and the Tribunal issues notice to the insurer u/s 149(2) so that it can be made liable to pay the amount awarded against the insured and if necessary, deny liability under the policy of insurance, on any of the grounds mentioned in section 149(2). If an insurer is only a noticee and not a party respondent, having regard to the decision in *National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others*, , it can defend the claim only on the grounds mentioned in section 149(2) and not any of the other grounds relating to merits available to the insured-respondent. This is the position even where the claim proceedings are initiated suo motu under sections 149(7) (sic 166(4)] and 158(6) of the Act, without any formal application by the claimants, as the insurer is only a noticee u/s 149(2) of the Act.

10. Section 170 of the Act does not contemplate an insurer making an application for impleadment. Nor does it contemplate the insurer, if he is already impleaded as a party respondent by the claimants, making any application seeking permission to contest the matter on merits. Section 170 proceeds on the assumption that a claim petition is filed by the claimants, or is registered suo motu by the Tribunal, with only the owner and driver of the vehicle as the respondents. It also proceeds on the basis that in such a proceeding, a statutory notice would have been issued by the Tribunal to the insurer so that the insurer may know about its future liability in the claim petition and also resist the claim, on any of the grounds mentioned in section 149(2). Section 170 of the Act also assumes that the Tribunal will hold an inquiry into the claim, where only the claimants and the owner and driver will be the parties. Section 170 provides that

if during the course of such inquiry, the Tribunal finds and satisfies itself that there is any collusion between the claimant and the owner/driver or where the owner/driver has failed to contest the claim, the Tribunal may suo motu, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of the claim, who was till then only a noticee, shall be treated as a party to the proceedings. The insurer so impleaded without prejudice to the provisions of section 149(2), will have the right to contest the claim on all or any of the grounds that are available to the driver/owner.

11. Therefore, where the insurer is a party respondent, either on account of being impleaded as a party by the Tribunal u/s 170 or being impleaded as a party respondents by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available u/s 149(2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party. When a statutory notice is issued u/s 149(2) by the Tribunal, it is clear that such notice is issued not to implead the insurer as a party respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party respondent. But it can, however, be made a party respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal u/s 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party respondent, it can raise all contentions that are available to resist the claim.

The said view has also been endorsed recently by the Hon''ble Apex Court in the unreported judgment *Bajaj Allianz General Insurance Company Ltd. Vs. Kamla Sen and Others* in Civil Appeal No. 9427 of 2013, decided vide order dated 23.10.2013.

21. The judgments cited by the respondents do not support the impugned award as the judgments are based on their version of facts. They cannot be relied upon as precedent for deciding the instant case.

22. Coming to the instant case, it is indisputably on record that the appellant/insurance company was made party as non-applicant no. 3 by the claimants in the claim petition before the Tribunal.

23. Considering the aforesaid view held by the Hon''ble Supreme Court and the facts and circumstances as stated earlier, it is concluded that the refusal of permission by the tribunal to the insurer for defending the proceeding u/s 170 of the Motor Vehicle Act on all grounds does not appear to be justified and so setting aside the order dated 26.6.2006, the permission is granted as sought by the appellant.

24. Thus having taken into account the above circumstances, it is inferred that the appellant/insurance company has a right to challenge the legality and

propriety of the award on the ground of non-involvement of the vehicle in the alleged motor accident claim case. In the instant case, as held earlier, the claimants have utterly failed to have proved the alleged accident to have been caused by the said truck bearing No. M.P.09-K.D.2735 resulting into the death of the deceased Kashiram. Consequently, the insurance company is not liable to pay the compensation as awarded by the tribunal vide impugned award.

25. Therefore, allowing the appeal and setting aside the impugned award, the liability to pay the compensation by the appellant/insurance company held by the learned claims Tribunal is hereby quashed. In the facts and circumstances of the case, no order is passed as to the costs.