
(2014) 05 AHC CK 0176

In the Allahabad High Court

Case No : First Appeal From Order No. 2626 of 2010

United India Insurance Co. Ltd.

APPELLANT

Vs

Chhamta Gupta

RESPONDENT

Date of Decision : 27-05-2014

Acts Referred:

Evidence Act, 1872 — Section 108, 109, 147
Motor Vehicles Act, 1988 — Section 163A, 170
Penal Code, 1860 (IPC) — Section 364, 406

Citation : (2015) 1 ACC 60 : (2015) ACJ 1883 : (2014) 105 ALR 896 : (2014) 5 AWC 5291

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : V.C. Dixit, Advocate for the Appellant; A.C. Srivastava, A.L. Srivastava, Avnish Ranjan Srivastava and Daya Shankar, Advocate for the Respondent

Final Decision : Allowed

Judgement

Manoj Misra, J.—Heard Sri V.C. Dixit for the appellant; Sri Avnish Ranjan Srivastava for the claimant-respondents and perused the record. The instant appeal has been filed against the judgment and award dated 26.5.2010 passed by the Motor Accident Claims Tribunal/Special Judge (E.C. Act), Mainpuri in M.A.C.P. No. 238 of 2002 by which compensation of Rs. 3,47,500/- has been awarded to the claimant-respondents on presumptive death of Naresh Chand Gupta.

2. According to the claimants' case the facts, in brief, are that on 1.6.1999 Naresh Chand Gupta (husband of the claimant respondent No. 1 and father of the rest of the claimant respondents), allegedly, took Armada vehicle No. UP-84A-2875, as a driver thereof, from its controller i.e.,-Mahendra Nath Chaturvedi (the person in possession and control of the vehicle) for repairs. On way, he met Raju Gupta, who was an agent of Mahendra Nath Chaturvedi. Raju Gupta gave Rs. 100/- to Naresh Chand Gupta for booking the vehicle for a

journey to Bewar. In the evening, at 6:30 p.m., Naresh Chand Gupta left informing his wife Chhamta Gupta (the claimant-respondent No. 1) that he is leaving for Bewar. Thereafter, Naresh Chand Gupta did not return. Neither the vehicle nor his dead body was found. Mahendra Nath Chaturvedi, the controller of the vehicle, alongwith one Sanjay Kumar (registered owner of the vehicle) jointly lodged a first information report against Naresh Chand Gupta, which was registered as Case Crime No. 601 of 1999 u/s 406, I.P.C. at P.S. Kotwali, Mainpuri. The claimant-respondent No. 1, namely, the wife of Naresh Chand Gupta lodged cross FIR against Mahendra Nath Chaturvedi and his agent Raju Gupta u/s 364, I.P.C., which was registered as Case Crime No. 601A/1999 at P.S. Kotwali, Mainpuri. As Naresh Chand Gupta was not heard of since 1.6.1999, presuming him to have died in a motor accident, involving the said vehicle, a claim petition was filed u/s 163A of the Motor Vehicle Act for compensation.

3. The claim was resisted by the insurer of the vehicle (the appellant), who was not only impleaded as an opposite party but had also obtained permission u/s 170 of the Motor Vehicles Act, inter alia, on ground that it has not been proved that Naresh Chand Gupta died, that too, in an accident arising out of the use of motor vehicle, therefore, the claim petition was misconceived and was liable to be dismissed. The case, however, proceeded ex parte against the other opposite parties.

4. By the impugned judgment and award, the Tribunal allowed the claim petition on ground that since 1.6.1999, for a period of over seven years, Naresh Chand Gupta was not seen or heard of, a presumption of his death would be drawn u/s 108 of the Evidence Act and as he was last seen leaving with vehicle U.P. No. 84A-2875, it could be presumed that he died on 1.6.1999 in an accident involving the use of vehicle and, as such, the claim petition was maintainable and compensation payable. It proceeded to hold that since there was evidence on record that on the date i.e., 1.6.1999, the vehicle was duly insured and Naresh Chand Gupta held a valid driving licence, therefore, the Insurance Company would be liable to pay compensation.

5. Assailing the award, Sri V.C. Dixit, learned Counsel for the appellant, submitted that even if a presumption of death of Naresh Chand Gupta can be drawn u/s 108 of the Evidence Act, no presumption could be drawn with regards to the date of his death as also that he died due to an accident arising out of use of the motor vehicle. In support of his contention Sri Dixit placed reliance on a decision of the Apex Court in the case of Oriental Insurance Company Ltd. Vs. Soremui Gogoi and Others, . In that case, the driver was found missing with the vehicle. Neither the dead body nor the vehicle was found. Taking the aid of section 108 of the Evidence Act, a claim under the Workmen Compensation Act, 1923 was set up taking a plea that he went missing during the course of employment and since he was not heard for over seven years his death be presumed and compensation be awarded. The Commissioner allowed the claim and the High Court dismissed the appeal. Allowing the appeal of the insurance

company, the Apex Court observed as follows:

"16. The sine qua non for invoking the proviso appended to section 147 is that the employee must be engaged in driving the vehicle. Death or bodily injury must occur arising out of or in the course of his employment. The 1923 Act or the 1988 Act, therefore, would be applicable only if the conditions precedent laid down thereunder are satisfied.

17. The employer lodged a first information report against Bipul Gogoi. A charge-sheet was also filed. There is nothing on record to show that death had occurred to Bipul Gogoi in an accident arising out of or in course of employment. If some miscreants have taken away the driver alongwith the vehicle or have murdered him, it is an offence. It, except in certain situations, does not give rise to a presumption that the death had occurred arising out of or in the course of an employment. Some evidence should have been adduced in that behalf. If the version brought on record by the police was correct, namely, he had himself run away with the vehicle and had not been heard for a period of seven years, particularly, when he had been declared a proclaimed offender by a Court of law, presumption u/s 108 of the Evidence Act could have been invoked by the criminal Court for dropping the criminal case that he is dead. In our opinion, in a case of this nature, the said provisions could not have been invoked for the purpose of grant of compensation under the 1923 Act without any other evidence having been brought on record.

18. Sections 108 and 109 of the Evidence Act are founded on the presumption that things once proved to have existed in a particular state are to be understood as continuing in that state until contrary is established by evidence either direct or circumstantial. The said provision can be invoked in a legal proceeding where the death of a person may be an issue. The section does not say that presumption would be applicable in all situations. It shall not apply in respect of a person who absconds from justice or evades a trial or is otherwise charged for commission of a grave offence as he in that situation may not communicate with his relations. Furthermore in a case of this nature, it is also difficult to rely upon self-serving statements made by the claimants that they had not heard of their son for a period of seven years. The Commissioner of Workmen's Compensation or the High Court did not assign any reason as to why the fact disclosed in the charge-sheet which was filed upon investigation that Bipul Gogoi himself had run away with the vehicle would not be a relevant fact, particularly, when cognizance had been taken by a Competent Court of law on the basis thereof.

19. Section 3 of the 1923 Act would be attracted only when the conditions precedent therefor are fulfilled and not otherwise."

6. Relying on the observations made by the Apex Court in the aforesaid decision, Sri Dixit submitted that in absence of any evidence that Naresh Chand Gupta died in an accident arising out of the use of the vehicle, no liability could be fastened on the Insurer either under the provisions of the Motor Vehicles Act or

under the provisions of Workmen's Compensation Act, 1923. It was submitted that for a claim to be maintainable under the Motor Vehicles Act, the death must occur due to an accident arising out of the use of motor vehicle and for a claim to be sustainable under the Workmen's Compensation Act, 1923, it must be substantiated that injuries were caused by an accident arising out of and in the course of his employment. It was submitted that in absence of the necessary ingredients to maintain a claim, as stated above, the Tribunal had no jurisdiction to entertain such an application u/s 163A of the Motor Vehicles Act. It was further submitted that even if it is presumed that Naresh Chand Gupta was dead, as he was not heard of for last more than seven years, it cannot be presumed that he died due to an accident arising out of the use of the motor vehicle. It was thus submitted that the judgment and award passed by the Tribunal is manifestly erroneous in law and is liable to be set aside.

7. Learned Counsel for the claimant-respondents submitted that from the evidence on record it appears to be a case of murder of Naresh Chandra during the course of employment that is while he was driving the vehicle concerned. It was submitted that recovery of the body or the vehicle was not required to show that he died in an accident involving the vehicle. As he was last seen with the vehicle on 1.6.1999 and since thereafter was not heard off for last more than seven years, it could be presumed that he died in an accident involving the vehicle concerned. It was submitted that in Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, , the Apex Court had granted compensation in a case where an Auto Rickshaw driver was murdered while resisting the act of stealing the Auto Rickshaw. It has been submitted that in the instant case, the Tribunal was legally justified in granting compensation as it appeared from the record that Naresh Chand Gupta was murdered and his body was disposed of while he was on duty as a driver of the vehicle concerned. The learned Counsel, however, could not draw attention of the Court to any evidence worth the name to show that Naresh Chandra Gupta was murdered during the course of his duty as a driver or that he died in an accident involving the vehicle.

8. Having considered the submissions of the learned Counsel for the parties and on perusal of the record, this Court finds that there is no evidence to show that Naresh Chand Gupta was murdered. Neither, the body of Naresh Chand Gupta was recovered nor any evidence was produced to show/suggest that he was murdered or killed. The evidence brought on record does not even prove that the vehicle with which Naresh Chand Gupta was last seen met with an accident. In fact, the vehicle itself has not been recovered. The evidence brought on record although does prove that he had not been heard of for last more than seven years. According to the claim case the owner had lodged a first information report alleging that Naresh Chand Gupta absconded with the vehicle whereas from the claimant's side, it has come that Naresh Chand Gupta was abducted with the vehicle. In either situation, it has not been proved that Naresh Chand Gupta died in an accident arising out of the use of the motor vehicle.

9. The decision of Rita Devi's case (supra) relied on by the claimant-respondents, is of no help to the claimant-respondents, inasmuch as, in that case evidence was brought on record to prove that the driver of the Auto Rickshaw was murdered by miscreants who wanted to steal the Auto Rickshaw, while the driver resisted the same. In the instant case, the evidence of murder is not available on record. There is also no evidence to show that there was an accident. Section 108 of the Evidence Act may enable a Court to draw a presumption that a man is dead if it is proved that he has not been heard of for last seven years by those who would naturally have heard of him, if he had been alive. But this presumption with regards to his death cannot be drawn in respect to the date of his death or the manner of his death. In *Gurdit Singh and Others Vs. Munsha Singh and Others*, a three Judges decision of the Apex Court, it was observed that u/s 108 of the Evidence Act, the precise time of the death is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within seven years lies upon the person who claims a right for the establishment of which the proof of that fact is essential. Similarly, in the case of *Saroop Singh Vs. Banto and Others*, : *Saroop Singh Vs. Banto and Others*, the Apex Court observed that u/s 108 of the Evidence Act, the Court though may presume that a person was dead having not been heard of for a period of seven years by those who would naturally have heard of him, if he had been alive, but that by itself would not be a ground to presume that the said person died seven years prior to the date of institution of the suit. Similar view has been taken by the Apex Court in the case of *Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others*, . A conspectus of these authorities would reveal that there can be no presumption with regard to the date of death. Likewise, it cannot be presumed that such a person was murdered or was killed in an accident arising out of the use of motor vehicle. Therefore, even if a presumption is drawn with regards to the death of Naresh Chand Gupta, such presumption cannot be extended to presume that he died in an accident arising out of the use of motor vehicle. The authority of the Apex Court in *Sorumai Gogoi's case (supra)*, in fact, applies with all force in the facts of the present case.

10. In view of the aforesaid legal position, as in the instant case there is no evidence to show that Naresh Chand Gupta died due to injuries suffered in an accident arising out of the use of the motor vehicle, the claim petition was not maintainable u/s 163A of the Motor Vehicles Act and as such the judgment and award passed by the Tribunal is manifestly erroneous and is liable to be set aside. The appeal is accordingly allowed. The judgment and award dated 26.5.2010 passed by the Motor Accident Claims Tribunal/Special Judge (E.C. Act), Mainpuri in M.A.C.P. No. 238 of 2002 is hereby set aside and the claim petition is dismissed. The appellant will be entitled to recover the amount, if any, deposited/paid by it under the judgment and award. There is no order as to costs.