(2010) 02 CHH CK 0035

In the Chhattisgarh High Court

Case No : M.A. No. 1083 of 2004

United India Insurance Co. Ltd. APPELLANT

Vs

Smt. Sunita Giri and Others RESPONDENT

Date of Decision : 17-02-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 149(2), 149(2)(a)(ii), 163A, 166

Citation : (2011) 4 MPJR 26

Hon'ble Judges : Sunil Kumar Sinha, J;Prashant Kumar Mishra, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Sunil Kumar Sinha, J.—These appeals have been directed against the award dated 15th of September, 2004 passed in Claim Case No. 17/04 by the Fifth Additional Motor Accident Claims Tribunal, Bilaspur. M.A. No. 1083/2004 has been filed by the claimants for enhancement of the amount of compensation. The facts, briefly stated, are as under:-

The claimants, unfortunate widow, minor children and brother of deceased-Shivkumar Giri filed a claim Petition u/s 166 of the motor Vehicles Act claiming compensation of Rs. 30,30,000/- for his death in the motor accident which took place at about 11.30 p.m. on 1.7.2003 when the Tanker bearing registration No. C.G.-04/G-1322, which the deceased was driving, was dashed by the offending Truck bearing registration No. C.G.-10/A-1971 on account of rash and negligent driving of the said truck by its driver. It was a head-on collision.

The Claimants pleaded that the deceased was earning Rs. 5000/-per month and was also getting Rs. 1500/- per month as allowances. The deceased was aged about 30 years.

The owner and driver of the truck remained ex-parte.

The insurer of the truck, united India Insurance Company Ltd., filed written statement pleading that the deceased himself was also responsible for the accident. It was a head-on collision and was a case of contributory negligence. They further took the plea that the driver of the Truck was not having a valid license, therefore, the Truck was being plied in breach of policy conditions.

Since the owner and the driver remained ex-parte, therefore, the insurance Company was granted permission to contest the claim on all possible grounds.

The claimants examined Sunita Giri (AW-1), Shivshankar (Aw-2), Dharmendra Kumar Dubey (AW-3) and Shankar Singh (AW-4) in support of their claim petition, whereas, the Insurance Company examined Abdul Salim, Asstt. Administrative Officer (NAW-1) in rebuttal.

The Tribunal recorded a finding that it was a case of contributory negligence. The deceased contributed to the extent of 1/3rd and the driver of the truck contributed to the extent of 2/3rd in the said accident.

The Tribunal held that the deceased was earning Rs. 3,000/- per month. After deducting 1/3rd towards the personal expenses of the deceased, the dependency was worked out to Rs. 2,000/- per month and Rs. 24,000/-, per annum. By applying multiplier of Rs. 16 to the said annual dependency of Rs. 24,000/- the compensation was worked out to Rs. 3,84,000/-. By adding a further sum of Rs. 90,000/- under the other heads, the total amount of compensation was worked out to Rs. 4,74,000/-. Since the finding of contributory negligence in the ratio of 1/3rd: 2/3rd was recorded, therefore, a sum of Rs. 3,16,000/- was determined as the amount of compensation payable to the claimants on account of death of deceased Shivkumar Giri in the motor accident. The Tribunal also awarded interest at the rate of 9% from the date of filing of the claim Petition i.e., 12.1.2004 till realization. The Tribunal held that the owner, driver and the insurer of the offending truck were jointly and severally liable to pay the said amount to the claimants.

3. Mr. H.B. Agrawal, learned Sr. Advocate appearing on behalf of the Insurance company, raised three fold arguments. He submitted that since it was a head-on collision, therefore, the liability of both the drivers was to be extent of 1/2:1/2. Secondly, he submitted that the driver of the Truck was holding a fake driving license, therefore, the Insurance Company was not liable to pay compensation. He also submitted that the amount of Rs. 90,000/- has been awarded under various other heads which is also very high.

4. Mr. M.K. Bhaduri, learned counsel appearing on behalf of the claimants, while opposing the aforesaid arguments, submitted that the income of the deceased was not properly assessed; deduction was not proper; and a low compensation was awarded.

5. We have heard the learned counsel for the parties at the length and have also perused the records of the claims case.

6. Firstly, we shall examine the finding of contributory negligence.

7. Admittedly, the accident took place at about 11.00 p.m. when Tanker, which the deceased was driving, was carrying malt from Bilaspur to Raigarh distilleries, Shanker Singh (AW-4) was Head-Constable in the Excise Department. He was an occupant of the Tanker as he was on duty to carry the malt from Bilaspur to Raigarh. He deposed that deceased Shivkumar Giri was driving the Tanker at the time of the accident. A Truck came from the opposite direction with only one head-light on. The accident occurred near village Nariyara. The driver died on the spot after about half-an-hour of the accident. He lodged the First Information Report (Ex.-P/2) in the police station. In the cross examination, he admitted that it was a head-on collision between the said two vehicles. The road is quite wide and both the vehicles could have easily passed through the road. He deposed that if the drivers of both the vehicles would have kept their vehicles on their sides, the accident could have been avoided. No other witness has been examined to prove as to how the accident occurred. The tribunal held that since the offending truck was coming with one head-light on, therefore, in the head-on collision, the driver of the Tanker was less responsible and in this manner the liability has been fixed to the extent of 1/3rd: 2/3rd.

8. In the matter of A.P.S.R.T.C. and Another Vs. K. Hemalata and Others, , the Apex Court held that "To determine the question that who contributed to the happening of the accident, it becomes relevant to ascertain who was driving his vehicle negligently and rashly and in case both were so doing who was more responsible for the accident and who of the two had the last opportunity to avoid the accident. In case the damages are to be apportioned, it must also be found that the plaintiff''s fault was one of the causes of the damage and once the condition is fulfilled the damages have to be apportioned according to the apportioned share of the responsibility. The Apex court said that if the negligence on the plaintiff''s part has also contributed to damage this cannot be ignored in assessing the damages. He can be found guilty of contributory negligence if he ought to have foreseen that if he did not act as a reasonable, reasoned man, he might himself be hit and he must take into account the possibility of others being careless."

9. In the present, as stated above, the road was quite wide and two vehicles could easily have crossed, if the drivers would have been vigilant but if the vehicles met with an accident and the collision was head-on, certainly, both the drivers were negligent and both have contributed to the accident. When the driver of the Tanker saw that the opposite vehicle is coming with only one head-light on, he would have stopped his vehicle to avoid the accident. Present is not a case in which the driver of the Tanker stopped the Tanker and then it was dashed by the offending Truck. Therefore, the finding of the contributory negligence has rightly been arrived at by the Tribunal. Mr. H.B. Agrawal, learned sr. Counsel, appearing on behalf of the Insurance Company, referring to Para-15 of the award, argued that both the vehicles were having only one head-light on, therefore, the drivers of both the vehicles were equally responsible for the accident and contribution was in ratio of 1/2:1/2. The arguments advanced

cannot be sustained merely on the ground that there is not material on record to show that the Tanker was also having only one head-light on. We have carefully gone through the entire evidence to find out the material to support the said contention but nothing like that is available on record. It appears that a complex sentence has been written in the award by the Presiding Officer of the Tribunal in such a manner that it creates an impression that the Tanker was also having only one head-light on. But factual position is not at all like that. Since the driver of the Truck was having only one head-light on, therefore, he was more responsible than the driver of the Tanker who could have avoided the accident. In the facts and circumstances of the case, the Tribunal, therefore, has rightly determined that the liability of the drivers was in the ratio of 1/3:2/3.

10. So far as the question of fake license is concerned, that itself would not be a ground for exonerating the Insurance Company in absence of proof that the insured was guilty of negligence and he failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding the use of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant time. The burden of proving such fact lies on the Insurance Company. Mere absence, fake or invalid driving license or any disqualification of the driver are not in themselves the defences available to the insurer either against the insured or the third parties. This has been laid down in the matter of National Insurance Co. Ltd. Vs. Swaran Singh and Others, in which the Supreme Court recorded the following findings vide Para 110:-

The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provision of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise defence in a claim petition filed u/s 163A, or Section 166 of the motor Vehicles Act, 1988, inter alia, in terms of Section 149 (2) (a) (ii) of the said Act.

(iii) The breach of policy conditions e.g. disqualification of the driver or invalid driving license of the driver, as contained in sub-section 2 (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by insurer. Mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer 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 the condition of the policy regarding use of vehicles by a duly licensed driver or one who has not disqualified to drive at the relevant time.

(iv) Insurance Companies, however, with a view to avoid their liability must not only establish the available defence (s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of therefore would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, in as much as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid license by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving license is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer u/s 149 (2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to weather the driving license produced by the driver (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner''s license, the Insurance Companies would be liable to satisfy the decree.

(ix) The Claims tribunal constituted under Suction 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on Adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149 (2) read with sub-section (7) as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner u/s 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The Provisions contained in sub-section (4) with the proviso there under and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances abjudication of their claims inter se might delay the adjudication of the claims of the victims.

11. In the present, Abdul Salim, Asst Administrative officer (NAW-1) deposed that the driving license of driver Shriram was verified through the investigator Mr. Raj Tilak Saxena who gave his report that the driving license No. R/6603/Jhansi/86 was not issued from Jhansi, R.T.O. as such report was received by the Investigator from the concerned R.T.O. The report of the Investigator has been filed as Exhibit-D/2 and the report of Jhansi, R.T.O. has been filed as Exhibit-D/3. We note that the license or the copy of the license have not been filed before the Tribunal. We are unable to find out that from where the aforesaid number was got by the insurance Company. NAW-1 has also admitted that he does not know as to whether the license of the driver has been filed in the matter or not. In the facts and circumstances of the case, the Insurance Company has not discharged its burden to prove that the insurer was guilty of negligence. He failed to exercise reasonable care in the matter of fulfilling the conditions of the Policy regarding the use of vehicle by a duly licensed driver or one who was not disqualified to drive at the relevant time. Therefore, the argument in this regard cannot be sustained.

12. Now we shall consider the argument relating to quantum of compensation.

13. As far as the income of the deceased is concerned, the claimants pleaded that he was earning Rs. 5,000/- per month and he was also getting allowances at the rate of Rs. 1,500/- per month but the evidence led in that behalf was not of clinching nature. The employer or any other person on his behalf did no appear before the Tribunal to prove such income of the deceased. There is only oral evidence of the wife and brother of the deceased that the deceased was earning Rs. 5,000/- per month and he was also getting allowances. It is in this situation, the Tribunal held that even if the income of the deceased is calculated treating him to be one skilled labour, it would come to Rs. 100 per day and Rs. 3000/- per month. We do not find any fault in such approach of the Tribunal for

assessing the income of the deceased in the facts and circumstances of the case. The Tribunal has deducted only 1/3rd towards the personal expenses of the deceased which also appears to be reasonable in view of the dictum of the Apex Court in the matter of Syed Basheer Ahamed and Others Vs. Mohd. Jameel and Another, in which, it has been held that the general rule regarding deduction from the income of the deceased is 50% if he is bachelor and one-third if he is married. Therefore, it cannot be said that the deduction was wrong.

14. So far as multiplier is concerned, admittedly, the deceased was aged about 30 years on the basis of post-mortem report (Ex.-P/3). His wife was 23 years of age and his two minor children Mohit Giri (son) and Monika Giri (daughter) were aged about 4 years and 13 months, hence the multiplier of 16 also appears to be reasonable. However, the amount of Rs. 90,000/-, as awarded vide Para-29 of the award, under other heads appears to be quite unreasonable. The Tribunal has awarded Rs. 25,000/- each to claimants 1 to 3 on account of love and affection and Rs. 5,000/- to claimant No. 4 under the same head and has further awarded Rs. 10,000/- for funeral expenses. We set-aside this part of the award. We deem it appropriate to award Rs. 16,000/-under the other permissible heads over and above the amount of Rs. 3,84,000/- awarded by the Tribunal.

15. Therefore, the amount of compensation is re-calculated as under:-

The annual dependency of Rs. 24,000/- is multiplied by 16 which works out to Rs. 3,84,000/-. By adding further sum of Rs. 16,000/- under he other permissible heads, the total amount of compensation comes to Rs. 4,00,000/-.

16. Since we have affirmed the finding of contributory negligence in which the deceased was held responsible to the extent of 1/3rd, therefore, after deducting 1/3rd from the total amount of compensation of Rs. 4,00,000/ - i.e. Rs. 1,33,000/-, the compensation payable to the claimants comes to Rs. 2,67,000/-. The claimants, thus, would be entitled to receive Rs. 2,67,000/ - as the amount of compensation on account of death of deceased Shivkumar Giri in the motor accident. Looking to the entire facts and circumstances of the case, we do not interfere with the interest part of the award passed by the Claims Tribunal.

17. For the foregoing reasons, M.A. No. 1304/2004 filed by the claimants for enhancement of the amount of compensation is dismissed and M.A. No. 1083/2004 filed the Insurance Company is allowed to the extent indicated above. There shall be no order as the cost(s).

