

(2016) 02 PAT CK 0008

In the Patna High Court

Case No : Miscellaneous Appeal No. 509 of 2012

United India Insurance Company Limited

APPELLANT

Vs

Sarwan Rabidas

RESPONDENT

Date of Decision : 12-02-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 147(1)(b)(i), Section 166(2)

Citation : (2016) 2 BBCJ 22 : (2016) 2 BLJud 25

Hon'ble Judges : Mr. Aditya Kumar Trivedi, J.

Bench : Single Bench

Advocate : Mr. Durgesh Kumar Singh, Advocate, for the Appellants; Mr. Ganpati Trivedi, Sr. Advocate and Mr. Madan Mohan, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Aditya Kumar Trivedi, J.—Appellants/Opposite Parties have challenged judgment dated 03.03.2012 and award dated 20.04.2012 passed by Additional District and Sessions Judge-IV-cum-Motor Accident Claim Tribunal, Naugachia, Bhagalpur in Claim Case No. 225/2010 allowing the claim petition by way of ascertaining the compensation amount to a tune of Rs. 5,03,700/- directing the appellant/O.P. to pay after deducting Rs. 50,000/- so paid in terms of Section 140 of the M.V. Act, remaining Rs. 4,53,700/- with an interest @ of 6% per annum pendente lite as well as till its realization which should be paid within 60 days failing which the amount should be realized through the process of the court, by way of filing instant appeal.

2. Interlocutory Application No. 6757/2014 has also been filed to condone the delay in filing the appeal covering that of eleven days and in the facts and circumstances of the case, is hereby condoned.

3. Respondent No. 1, initially and subsequently by amendment, respondents No. 2, 3 and 4 stood as claimant against deceased Fulo Devi wife of Kishandeo Rabidas, one of the applicants, who met with death in a motor vehicle accident

having committed on 09.02.2010 at about 3:00 P.M. by a vehicle bearing Registration No. BR 11F-0375 (Tractor) on account of rash and negligent driving by the driver of the said tractor and for that, Korha PS Case No. 30/2010 was instituted under Section 279, 304A of the IPC. It has also been disclosed that at the time of accident, the offending vehicle was insured under United India Insurance Company Limited, Purnea. It has further been disclosed that at the time of accident, the vehicle was being driven by Rajkumar Poddar. Furthermore, it has been disclosed that at the time of death, deceased Fulo Devi was aged about 39 years and was a vegetable vendor as well as agriculturist earning Rs. 5,000/- per month and so had claimed compensation to the tune of Rs. 6,49,500/-.

4. The owner of the vehicle as well as Insurance Company appeared and have filed two different independent written statements. Owner, who happens to be Respondent No. 5, at the present stage having failed to appear in the appeal, had pleaded that claim petition was not maintainable as it does not happen to be in accordance with Rule 226, 227 and 248 of Bihar Motor Vehicle Rules 1992. It has further been disclosed that the tractor in question bearing Registration No. BR11F-0375 stands in his name but happens to be duly insured under United India Insurance Company Limited and the policy remained effective from 25.07.2009 to 24.08.2010 and thus, covers the period of accident. Furthermore, it has also been submitted that driver was possessing genuine valid driving license and on account thereof, had driven the vehicle with valid license. It has further been submitted that owner had not committed breach of contract in terms of Section 149 (2) of the M.V. Act and on account thereof, the Insurance Company is under obligation to indemnify the liability.

5. With regard to factual aspect, it has been submitted that whatever assertions have been made in the claim petition, happen to be wrong, incorrect, baseless and has been levelled only to make out a ground for claim case otherwise deceased Fulo Devi was responsible for her own negligence who, crossed the road taking risk of accident, therefore, the owner or the driver cannot be held responsible. Furthermore, it has also been submitted that compensation is to be granted in terms of tortuous activity. Because of the fact that there happens to be negligence on the part of the deceased herself while meeting with accident, therefore, amount so claimed by the applicant happens to be exorbitant one.

6. Appellant/Insurance Company had filed its independent WS where under apart from putting ornamental objection had stated that the averments whatsoever been made under claim petition have to be duly substantiated at the end of the claimant. It has further been submitted that accident had taken place at Katihar district, permanent address of the claimant has been shown within the jurisdiction of Katihar, as such, the instant claim case happens to be non maintainable at Bhagalpur/Naugachia and as such, it was upon claimant to satisfy the jurisdictional avenue. Furthermore, it has also been submitted that unless and until, relevant documents are filed at the end of the owner suggesting

its authentication, then and then only, the liability will be shared by the Insurance Company. It has also been submitted that the amount of compensation as claimed for happens to be exorbitant one which applicants are not at all entitled for.

7. It has further been submitted that in case, the owner fails to appear, then in that event, the insurance company reserves right in terms of Section 170 of the M.V. Act.

8. After hearing the parties, learned Tribunal had framed the following issues:-

1. Is the claim case as framed maintainable or not?
2. Have the claimants any cause of action to file the suit?
3. Has the accident occurred due to rash and negligent driving of the driver of the said vehicle?
4. Are the claimants entitled to get relief or reliefs as sought for?
5. Is the O.P. Insurance Company is liable to pay compensation as claimed by the claimants in this suit?

and the learned Tribunal decided the same in favour of applicant against the insurance company. Hence this appeal.

9. Manifold arguments have been advanced on behalf of appellant while assailing the judgment and award impugned. The first and foremost ground is regarding maintainability of instant petition. In order to substantiate its case, it has been submitted that from the claim petition itself it is evident that occurrence took place within the jurisdiction of Katihar district, the applicants are permanent residents of Katihar District while the claim petition has been filed at Bhagalpur without having supported with cogent and reliable evidence regarding doing their business within jurisdiction of Bhagalpur District that at present address which has been shown and on account thereof, there happens to be inherent deficiency persisting on the record ousting jurisdiction of claim Tribunal Bhagalpur to entertain claim petition and in likewise manner adjudication thereof.

10. Furthermore, while stressing upon the maintainability of instant petition, again it has been submitted that driver has not been made a party. Non presence of driver on account of non arraying as a party is a serious lacuna because he is the persons at whose fault the accident took place. Therefore, he is the main tortfeasor. Had there been his presence and a plea on his behalf along with relevant documents, more particularly, a valid driving license would have been placed, then and then only, the insurance company would come into play. It has also been submitted that insurer is liable to indemnify the insured only in case where there happens to be no breach of condition as laid down under Section 149(2) of the M.V. Act. In this connection, it has been submitted that the tractor in question was insured for agriculture purpose and accident took place while soil was being carried over trailer attached therewith. Thus, there was clear violation

of terms of policy, hence Insurer was not liable to be directed to pay the amount.

11. Apart from this, it has also been submitted that there happens to be complete absence of cogent and reliable evidence over income of deceased and that being so, the learned Tribunal should not have accepted the disclosure made by the claimant as a gospel truth. Furthermore, the multiplier so adopted by the learned Tribunal also happens to be wrong and incorrect as is not firmly supported with the evidence. So submitted that the judgment and award passed by the learned Tribunal happens to be bad, illegal, incorrect and not supported by the sound principle of law and is, accordingly, fit to be set aside.

12. On the other hand, learned counsel for the Respondent Nos. 1 to 4 has controverted the submissions made on behalf of appellants and submitted that all the points have been argued out of the record. In order to substantiate the same, it has been submitted that all the points so taken up by the appellant happens to be mere for argument's sake because of the fact that during course of examination of witnesses, no cross-examination was made at the end of the appellant over jurisdictional point. Once it has been waived, then in that event, appellant was precluded in re-agitating. In likewise manner, it has been submitted that the appellant also did not take a plea in its WS with regard to status of the driver and that was rightly overlooked because of the fact that in para-17 of the claim petition, name of the driver was there. Furthermore, it has also been submitted that apart from having disclosure in the claim petition, owner had also disclosed necessary information with regard to valid driving license with full details. So, it was well within the knowledge of appellant and that being so, now the appellant is not at all competent enough to challenge the findings on those score.

13. In likewise manner, it has also been submitted that specific disclosure has been made by the applicant during course of evidence with regard to earning of deceased as well as age of the deceased which, even not been demolished during cross-examination at the end of appellant and on account thereof, the learned Tribunal had rightly passed the judgment and award which happen to be in accordance with law and is fit to be confirmed.

14. From the lower court record, it is evident that altogether two witness have been examined on behalf of claimant out of whom CW-1, Shankar Ram had supported the case including the earning as well as age of the victim. The appellant was so careless that the aforesaid witness was not at all cross-examined at their end. CW-2 is Sarwan Rabidas, one of the claimants who also corroborated his pleadings. During cross-examination, it is evident that appellant had tested this witness in detail. However, from his cross-examination, the age of the deceased is found under dispute. This CW-2 is an informant of Korha PS Case No. 30/2010 (Ext-1) wherein he had not disclosed the age of the deceased. When his cross-examination has been gone through on this very score, it is evident that he had disclosed that he has two elder sisters, Punam Devi and Rina Devi who are married. Two younger brothers are also there. His own age on the

date of examination happens to be 22 years. His evidence was recorded on 24.08.2011. The occurrence is of the year 2010. Husband of deceased also happens to be one of the applicants has not come forward to depose, reason best known to him and on account thereof, accepting the plea that deceased was aged about 39 years is not at all found convincing. In the postmortem report, (Ext-3), age of deceased has been shown as about 40 years.

15. Now coming to the quantum of income, it is evident that in a very negligent manner, the issue has been dealt with by the learned lower court. The learned lower court had accepted the oral testimony without being corroborated with any sort of documentary evidence nor by independent evidence that deceased was vegetable vendor and was earning Rs. 200-300/- per day. However, as stated above, the appellant failed to controvert the same.

16. Reverting back over issue on non-maintainability of the claim petition on the ground on non impleading of driver in the background of a decision reported in (2007) 5 SCC 428 relied upon by the appellant, the same is not at all found applicable in the facts and circumstances of the present case for the following reasons, (a) in para-17 of the claim petition, the name of driver of the concerned vehicle is mentioned, (b) the insurance company was very much conscious with regard to presence of name of driver in column no.17 of the claim petition and that happens to be the reasons behind that no specific ground has been taken in the WS challenging maintainability on that very score (C) owner by way of filing WS had reiterated the same (d) was not all challenged during course of cross-examination of claimant (e) no question has been raised over validity/invalidity of the driving license belonging to the driver.

17. Furthermore in the case of Khenyel v. New India Assurance Company Limited & others reported in (2015) 9 SCC 273 wherein it has been held:-

"3. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tortfeasors. In a case of accident caused by negligence of joint tortfeasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tortfeasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the court. However, in case all the joint tortfeasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tortfeasor vis-a-vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasons for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant."

18. Then thereafter discussing the relevant provisions of tort as well as relying upon earlier judicial pronouncement it has been concluded under para-22 as

follows:-

"22. What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

19. Therefore, the plea of the appellant that the claim petition happens to be a defective one on account of non impleading of the driver is found misconceived.

20. Another plea, questioning maintainability of the claim petition filed at Bhagalpur instead of Katihar within which jurisdiction the accident had taken place as well as permanent residence of applicant happens to be, is also found non appreciable in the background of following eventualities, (a) though a ground has been taken in the WS on that very score but the appellant failed to impress upon the learned Tribunal whereupon no issue was framed on that very score during trial (b) during cross-examination of witnesses, appellant failed to test more particularly, one of the applicants, CW-2 on that very score, confining as well as disputing at the present address shown by the respondent while filing the claim petition at Bhagalpur (C) failed to substantiate at its end controverting at the present address given by the applicant/respondent. (d) That appellant had no branch office within the jurisdiction of Bhagalpur jurisdiction (e) no instance of prejudice is found brought up on record.

21. Section 166(2) of the Motor Vehicle Act could be taken as recourse in the present context which reads as follows:-

"[(2) Every application under sub-section(1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carried on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under Section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant."]

22. From plain reading of the aforesaid Section, it is evident that relaxation on the score of place of presentation of claim petition has been made, and, unless and until there happens to be cogent and reliable evidence to contradict the same, the option so available could be availed by the claimant. As is evident from the lower court record, save and except incorporating the issue in WS, no positive exercise has been taken at the end of the appellant to nullify.

23. Aforesaid view is found further supported with *Malati Sardar v. National Insurance Company Ltd* reported in AIR 2016 SC 247 wherein it has been held as follows:-

"14. The provision in question, in the present case, is a benevolent provision for the victims of accidents of negligent driving. The provision for territorial jurisdiction has to be interpreted consistent with the object of facilitating remedies for the victims of accidents. Hyper technical approach in such matters can hardly be appreciated. There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting parties in such cases, has its business. In such cases, there is no prejudice to any party. There is no failure of justice. Moreover, in view of categorical decision of this Court in *Mantoo Sarkar* (AIR 2009 SC 1022) (*supra*), contrary view taken by the High Court cannot be sustained. The High Court failed to notice the provision of Section 21 CPC.

24. With regard to ancillary issue that tractor was moving with the trailer during course of which the accident had taken place and further, having complete silence at the end of applicant with regard to registration number of the trailer as well as non disclosure at their end having the trailer insured is of no fruitful purpose because of the fact that there happens to be specific disclosure that deceased was dashed by the tractor on account thereof, the aforesaid deficiency is not going to adversely affect upon the fate of the claim petition.

25. Now coming to the quantum of compensation, certainly that needs reappraisal in the background of the material having available on the record. As stated above, the deceased was shown to be aged about 39 years while in postmortem report, Ext-3, she was shown about 40 years. However, when the evidence of CW-2, one of the claimants is to be taken together, some sort of infirmity is found on that very score as pointed out in foregoing paragraphs.

26. Evidence on an affidavit relating to CW-2, one of the applicants was filed on 24.08.2011 where under he disclosed his age as 22 years. Furthermore, during course of his cross-examination, he had admitted that two sisters, namely, Punam Devi and Rina Devi were elder to him. So, considering his evidence, the deceased must be aged about more than 45 years. Apart from this, although there happens to be disclosure in the petition that the deceased was a vegetable vendor and was earning Rs. 5000/- per month which witnesses have spoken during course of their evidence is not at all found properly substantiated. On account thereof, notional income as prescribed under Bihar Minimum Wages Act specially for unskilled labourer at the time of accident, Rs. 119 per day is to be perceived and after deducting 3rd and having multiplier of 15, the sum comes to Rs. 4,26,600/-.

27. The learned Tribunal had already taken note of funeral expenses appertaining to Rs. 2000/-, loss of consortium, Rs.5000/- and loss of estate Rs. 2500/- calculating Rs. 9,500/-. Final sum of Rs. 4,36,100/- is found payable with interest @ 6% pendente lite till realization of the amount. The aforesaid mode of calculation is found permissible in light of principle laid down by Hon'ble Apex Court in the case of M. Mansoor v. United India Insurance Co. Ltd. reported in (2013) 15 SCC 603 wherein it has been held as follows:-

"13. The Tribunal adopted the multiplier of 17 and the High Court determined the multiplier as 12 on the basis of the age of the parents/claimants. This Court in the decision in Amrit Bhanu Shali v. National Insurance Co. Ltd [(2012) 11 SCC 738] held as follows: (SCC p. 744, para 15)

"15. The selection of multiplier is based on the age of the deceased and not on the basis of the age of the dependent. There may be a number of dependents of the deceased whose age may be different and, therefore, the age of the dependents has no nexus with the computation of compensation."

14. In the decision in Sarla Verma case [(2009) 6 SCC (Civ)770] this Court held that the multiplier to be used should be as mentioned in column (4) of the table of the said judgment which starts with an operative multiplier of 18. As the age of the deceased at the time of the death was 24 years, the multiplier of 18 ought to have been applied. The Tribunal taking into consideration the age of the deceased wrongly applied the multiplier of 17 and the High Court committed a serious error by bringing it down to the multiplier of 12."

28. Payment of Rs. 50,000/- at an earlier occasion inconsonance with Section 140 of the M.V. Act, shall be deducted and the remaining amount along with interest incurred thereupon should be paid within sixty days failing which Respondent/claimant will be entitled to receive the same through process of the court.

29. The instant appeal is dismissed with the aforesaid modification in quantum of compensation.