

(2021) 12 SHI CK 0060

In the High Court Of Himachal Pradesh

Case No : First Appeal Order (WCA) No. 84 Of 2010

United India Insurance Company Ltd. Through Its Divisional
Manager

APPELLANT

Vs

Asha Devi And Others

RESPONDENT

Date of Decision : 17-12-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 11 Rule 12
Workmen's Compensation Act, 1923 — Section 4A(3)

Citation : (2021) 12 SHI CK 0060

Hon'ble Judges : Satyen Vaidya, J

Bench : Single Bench

Advocate : Harish Bahl, Lovneesh Kanwar, Tek Chand, Naveen K. Bhardwaj

Final Decision : Dismissed

Judgement

Satyen Vaidya, J

1. By way of instant appeal, the appellant (for short, " Award dated 19.10.2009 passed by learned Commissioner under Workmen's Compensation Act, Sarkaghat, District Mandi, H.P. (for short, "Commissioner") in case File No. 3/2007.

2. Petitioner/claimant (for short, "wife") preferred claim petition under Workmen Compensation Act (for short, "Act") before the learned Commissioner for grant of compensation on account of death of her husband late Sh. Pawan Kumar, who was employed as driver by Respondent No.3 herein (for short, "owner") to drive truck bearing registration No.HR 38D-3310. As per wife, on 27.12.2006 her husband while driving above mentioned truck, in the course of his employment with owner, met with an accident and died as a result thereof. Age of the deceased, at the time of his death, was stated to be 29 years. As claimed, he was being paid salary of Rs.10,000/- per month. The truck in question was stated to be insured with the insurer at the time of accident. Wife also impleaded mother of deceased as proforma respondent (for short, "mother") being one of

the Class-I heir of the deceased.

3. The owner, despite service, chose not to contest the claim petition before the learned Commissioner and was proceeded ex-parte. Appellant-Insurer contested the petition on the grounds that the vehicle in question was not insured at the time of accident. The deceased was not holding legal and valid driving licence and the death of Pawan Kumar was not during the course of his employment. In addition, breach of terms of policy in generality was also pleaded.

4. Learned Commissioner framed the following issues:

i) Whether the deceased died on 27.12.2006 in an accident of truck No. HR-38D-3310?OPP

ii) Whether the deceased died during the employment of respondent No.1? ...OPP

iii) Whether the applicant is the sole dependent of deceased Pawan Kumar and entitled to the award of compensation with interest and also the penalty to the extent of 50%? ..OPP

iv) Whether the vehicle involved with accident was not insured? ..OPR.

v) Relief.

5. Petitioner/Respondent No.1 examined herself as AW-1 and proved on record copies of documents FIR (Ex.AW-1/B), Post Mortem Report (Ex. AW-1/C), Family Register (Ex.AW-1/D) and Insurance Cover Note (Ex. AW-1/E). She reiterated the contents of the claim petition on oath. In her cross-examination on behalf of the insurer it was suggested to her that the cheque, through which premium was paid by the owner for purchase of policy of insurance, had remained unpaid. To which she feigned ignorance. Besides this, it was also suggested to the wife that at the time of accident vehicle was without insurance, but she had denied such suggestion. Another witness, AW-2 Sh. Niranjana Singh, was also examined. As per this witness, he was also a driver and was on wheels following the vehicle of deceased at the time of accident in question. He further deposed that deceased Pawan Kumar was employed as driver by the owner. The cross-examination of this witness by the insurer was also on the similar lines as that of wife.

6. In rebuttal, the insurer, through statement of its counsel, placed on record a cover note in respect of vehicle in question for the period 07.03.2007 to 05.04.2007 as Ex.RW-2/A and Ex.RW-2/B. No other evidence was produced.

7. Learned counsel representing the mother made a statement adopting evidence and stand taken by the claimant. It was, however, asserted that the mother also was Class-I heir of deceased Pawan Kumar.

8. Learned Commissioner, allowed the claim petition and awarded a sum of Rs.5,61,742/- including interest and apportioned the same in the ratio of 75% and 25% in favour of the wife and the mother respectively. The liability to satisfy the award was fastened on the insurer by holding that insurance cover vide

Ex.AW-1/E was valid on the date of accident.

9. The insurer has assailed the impugned award mainly on the grounds that the award was result of misreading and mis-appreciation of evidence and the truck in question was not insured on the date of accident as cheque in lieu of premium, issued by the owner, had remained unpaid. Further, contention raised by insurer is that the relationship of employee and employer was not proved between the deceased and the owner and it had also not been proved that at the time of accident the deceased was having legal and valid driving licence. As per insurer, the liability to pay interest was wrongly fastened on the appellant, more so, from the date of accident, whereas as per Section 4-A (3) of the Act, the interest would fall due one month after adjudication of the claim by the Commissioner.

10. Vide order dated 19.10.2010, the appeal was admitted on the following substantial questions of law: -

1. Whether in the event of dishonour of the cheque paid towards the premium of the insurance policy the contract of insurance still subsists and the liability to indemnify the award can be fastened on the insurer particularly in view of clear recital in the policy document that in case of dishonour of premium cheque the policy document shall stand automatically cancelled from its very inception?

2. Whether in the absence of any proof that the decrease was having a valid driving license the liability could have been fastened on the insurance company when the owner of the ill-fated vehicle had chosen to be proceeded e-parte and the employer workman relationship had not been proved on record?

3. Whether the income of the deceased can be assessed on the basis of the bald statement of the claimant without there being any other proof in this behalf?

4 Whether the liability to pay interest on the amount of compensation awarded under the Workmen's Compensation Act can be fastened on the insurer unless such a liability is specifically undertaken in the contract of insurance?

5. Whether the interest under Section 4-A (3) of the Workmen's Compensation Act on the amount of compensation falls due on the date of accident or one month after the date of accident or one month after the date of accident or after one month after the date of adjudication of the claim by the Commissioner under the Workmen's Compensation Act?

11. I have heard learned counsel for the parties and have gone through the records of the case carefully.

12. Noticeably, the reply to the claim petition filed by the insurer reveals that there was no specific plea that the cheque issued in lieu of premium was dishonoured and therefore, there was no valid policy of insurance existing on the date of accident. However, such plea for first time was invented during the cross-examination of the claimant's witnesses. A plea which did not have any foundation in the pleadings cannot be allowed to be raised. The insurer also did

not lead any evidence to support such contention. In such view of the matter, there is no escape from conclusion that the policy of insurance Ex.AW-1/E was purchased by the owner for the vehicle in question having validity from 06.04.2006 to 05.04.2007.

13. Further the documents, Ex.RW-2/A and RW-2/B, reveal that a cover note for limited period of 07.03.2007 to 05.04.2007 was issued in the name of Surinder Kumar R/o House No.95, Village Sadipur, Tehsil Pathankot, District Gurdaspur (Punjab). It is also revealed that Ex.RW-2/A was issued on transfer of the vehicle by owner in favour of said Surinder Kumar for the remaining period of original policy Ex. AW-1/E. Substantial Question of law No.1 is decided accordingly.

13. As regards, the plea with respect to the deceased not having valid and effective driving licence, it can be noticed from the records that save and except an objection raised to this effect by the insurer in its reply, no evidence whatsoever was produced by insurer to prove such fact. Even no suggestion to this effect was put to the witnesses of the claimant.

14. It is settled that the onus to prove breach of condition(s) of the policy of insurance is always on the insurer. Reference can be made to the judgment passed by this Court in *Surender Singh vs. Smt. Jai Manti Devi and others* 2008 (2) Shim.L.C. 533, in which it was held as under:

"12. The onus to prove the issue whether the Insurance Company was not liable to pay the awarded compensation for the reason that the driver of the truck was not holding a valid driving license was heavy on the Insurance Company and rightly so fixed by the Tribunal.

[13] In *Narcinva v. Kamat v. Alfredo Antonio Doe Martins*, 1985 3 SCR 951, the Apex Court has held that the insured is under no obligation to furnish evidence so as to enable the insurance company to wriggle out of its liability under the contract of insurance. Mere failure on the part of the owner to produce the driving licence, when called upon to do so in the cross-examination would not discharge the burden and no adverse inference to the effect that the driver did not have a valid licence can be drawn. The insurance company should have got evidence to substantiate its allegation. Applying the test who would fail if no evidence is led, the Court held that it would be the insurance company.

[14] In *National Insurance Co. Ltd. v. Swaran Singh and Ors.*, 2004 AIR(SC) 1531, the Apex Court has held that once the assured proves that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within its exception. The Insurance Company, which alleges the breach must prove the same and is required to establish the said breach by cogent evidence. Failure to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. The Insurance Company with a view to avoid the liability must not only establish the available defences raised in the proceedings but must also establish the breach on the part of the owner of the vehicle."

15. Similar view has been taken by this Court in Anita Abrol and others vs. Rishi Co-operative Societies Limited and others Latest HLJ 2009 (HP) 1342, wherein it was held as under:

"9. The learned Motor Accident Claims Tribunal has erred in law by shifting the burden to prove whether there was breach of terms of the policy or not upon the owner. It is settled law that it is for the Insurance Company to prove that there was breach of terms of the policy and the driver did not have valid licence. In the present case the Insurance Company has not produced any evidence to prove the breach. The Counsel appearing for respondent No. 3 had not produced any evidence. Respondent No. 3 has not filed any application seeking details of the driving licence issued in favour of respondent No. 2.

10. Their Lordships of the Hon'ble Supreme Court in Narchinva V. Kamat and Anr. v. Alfredo Antonio Doe Martins and Ors., 1985 AIR(SC) 1281 have held as under:

"15. To sum up the insurance company failed to prove that there was a breach of the term of the contract of insurance as evidenced by the policy of insurance on the ground that the driver who was driving the vehicle at the relevant time did not have a valid driving licence. Once the insurance company failed to prove that aspect, its liability under the contract of insurance remains intact and unhampered and it was bound to satisfy the award under the comprehensive policy of insurance."

[11] It was necessary for the Insurance Company to give notice to the owner or the driver to give the details of the driving licence. The Insurance Company has also not moved any application under Order 11 Rule 12 of the Code of Civil Procedure for production of document. The onus of proving that the driver of the bus did not have the valid licence to drive the vehicle lied on the Insurance Company, because it was the Insurance Company which sought to avoid its liability under the policy on the ground that the terms of the policy had been violated.

It was not sufficient for respondent No.3-company to make assertion that the driver was not holding driving licence without adducing necessary proof and escape its liability under the policy. In the present case the driver was already arrayed as respondent No. 2. The requirement for holding the owner vicariously liable is that the driver was in the employment of the owner. This fact has not been denied by the owner."

16. Lastly, during course of arguments learned Senior Counsel representing insurer made a submission that the wife had failed to produce the driving licence of deceased despite the fact that a notice under order 11 Rule 12 of the Code of Civil Procedure was served upon her. This assertion also is not borne out from the record. Thus, the plea of insurer that deceased did not have legal and valid driving licence remained unsubstantiated and hence not proved. Substantial question of law No. 2 is accordingly decided.

17. The provision of Section 4 of the Act as it stood on the date of accident placed cap of Rs.4000/- per month to be considered as income of deceased, even though the income was proved to be more than that. Once the deceased was proved to be in employment of the owner, as a driver of truck, it will be preposterous to assume that his income would be less than Rs.4000/- per month. Even otherwise, referring to the records, no material was placed by the insurer to dislodge the version of the claimant. The wife while appearing as AW-1, had specifically stated that the deceased was earning Rs.10000/- per month from his job as a driver with the owner. Being wife of the deceased, she was the best person to depose as to what was the avocation and income of her husband. The statement of AW-1 to this effect has not been challenged on behalf of the insurer in cross-examination and hence, the same is deemed to be admitted. The insurer had, therefore, miserably failed to prove its plea. Substantial question of law No.3 is decided accordingly.

18. It is more than settled that right of compensation accrues under the Act from the date of cause of action i.e. the date of accident. Reference can be made to Partap Narain Singh Deo Vs Siriniwas Sabata and others (1976) 1 SCC 289 and also Oriental Insurance Co. Vs Khajuni Devi and others (2002) 10 SCC 567. Further, the liability of interest has to be borne by the insurer as the said liability is attached to the amount of awarded compensation under the Act, which the insurer is liable to indemnify and as necessary corollary the liability to pay interest would run from the date on which right to receive compensation accrues. Reference in this regard can be made to 1997 Lab IC 891(Ker) (DB), 1976 ACJ 104 (Guj) (DB), 1982 ACJ 361 (Kar) (DB), 1983 ACJ 231 (All) (DB), (1985) 1 TAC 359 (Bom) and also Ved Prakash Vs Premi Devi (1997) 8 SCC 1.

The substantial questions of law No.4 and 5 are accordingly decided.

19. In view of discussion made hereinabove, I find no merit in the appeal and the same is dismissed with no order as to costs.