

Sarubai and Others Vs. Surendrasing and Another

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Court : Mumbai Aurangabad

Decided On : Jul-07-2014

Judge : T.V. Nalawade

Appeal No. : First Appeal No. 2655 of 2010

Appellant : Sarubai and Others

Respondent : Surendrasing and Another

Judgement :

1. The appeal is filed against judgment and award of Claim Petition No. 93/2007 which was pending before the Claims Tribunal, Beed. The claim petition of the present appellants was partly allowed by the Tribunal. The Tribunal has not made the Insurance Company liable to pay the compensation amount. The decision is challenged both on the point of quantum and on the point of liability of Insurance Company to pay first. Both the sides are heard.

2. The accident took place on 24.11.2006. The truck bearing No. MH-23/Q-7296 owned by original respondent No. 1 and insured with original respondent No. 2 met with an accident. The husband of the original claimant No. 1 died in the accident. It is the case of widow and other dependents of the deceased that the deceased was aged about 45 years and he was monthly earning Rs. 5,000/- by working in Engineering Division of one Cooperative Sugar Factory. The widow of the deceased was aged about 40 years and the widowed mother of the deceased

was aged 80 years. The deceased had left behind four issues. The youngest issue was of 13 years old at the relevant time and the eldest issue was of the age of 21 years. Eldest issue, daughter, was married at the relevant time and so, the Tribunal has already held that she was not depending on the deceased for livelihood. It is the case of remaining dependents of the deceased that they all were totally depending on the deceased for their livelihood.

3. The matter proceeded *ex parte* against the owner. The Insurance Company filed written statement. The Insurance Company contended that there has been breach of conditions of policy as the driver of the truck was not holding valid and effective licence to drive the truck. It is also the case of Insurance Company that as per the requirement of law, no information was supplied by both the driver and the owner of the vehicle to it.

4. Before the Tribunal, only the claimants gave the evidence. The Tribunal has considered the record like copies of papers of investigation and copy of driving licence of the deceased. The Tribunal has held that the driver was having licence to drive motor cycle and L.M.V., but he was not holding licence to drive heavy vehicle like truck. After giving this finding, the Tribunal has held that Insurance Company cannot be made liable to pay the compensation or indemnify the owner. The Tribunal held that the salary certificate in respect of the deceased is not proved by the claimants and the Tribunal presumed that the deceased was earning Rs. 3,000/- per month. One third of this amount is deducted towards personal expenses of the deceased and total amount of Rs. 2.25 lakh is awarded by Tribunal on principle of fault.

5. The learned counsel for the appellants/claimants placed reliance on some reported cases like 2012 (3) ALL MR 543 (Bombay High Court Nagpur Bench) [New India Assurance Company Limited Vs. Sindhu w/o. Hiralal Tawade and Ors.], 2001 AIR (SC) 1419 [New India Assurance Co., Shimla Vs. Kamla : Kanku : Sheela Devi], 2010 (6) Mh.L.J. 811 (Bombay High Court) [Oriental Insurance Company Ltd. Vs. Pandit Nagorao Ade and Ors.] and 2006 (6) ALL MR (S.C.) 149 [Lal Chand Vs. Oriental Insurance Co. Ltd.].

6. On the other hand, the learned counsel for the Insurance Company placed reliance on the following cases 2013 (3) T.A.C. 29 (S.C.) [United India Insurance Co. Ltd. Vs. Sujata Arora] and the decision of this Court (Principal Bench] given in First Appeal No. 116 of 2011 on 3.10.2011 [The Manager, Bajaj Allianz General Insurance Co. Vs. Mangala Shantaram Shevale and ors.].

7. In the case of Sujata Arora cited supra decided by the Bench of two Hon'ble Judges of Apex Court, the Apex Court set aside the decision of the High Court. The High Court had held that the Insurance Company was bound to reimburse the owner. The Tribunal had held that there was breach of conditions of policy as the driver was not holding licence to drive the offending vehicle. Owner had paid the compensation to the claimants. In view of these circumstances, the decision given in favour of owner by the High Court was set aside which it was challenged by the Insurance Company. The case of Mangala cited supra decided by Principal Seat of this High Court can be considered only subject to decision given by the Apex Court on the point involved. On the other hand, in the cases cited for the appellants/claimants, the Nagpur bench and Principal bench of this court referred the cases of larger bench (of three Hon'ble Judges) of Hon'ble Judges of Supreme Court like (2004) 3 SCC 297 [National Insurance Co. Ltd. Vs. Swarn Singh and Ors.] and 2004 (5) ALL MR 238 (S.C.) [National Insurance Company Vs. Baljit kaur and Ors.].

8. In the landmark case of Swarn Singh cited supra, the Apex Court has discussed and interpreted the relevant provision viz. section 149 of Motor Vehicle Act, 1948 ('the Act' for short). The Apex Court has discussed the difference between the terms 'duly licenced' (used in section 149) and 'effective licence' (used in section 3 of the Act). It is laid down that the term used in section 3 of the Act cannot be imported in section 149 (2) of the Act. The Apex Court has also interpreted the term 'accident' in relation to the statutory defences available to Insurance Company (section 149 (2) of the Act). It is laid down by the Apex Court that even if the statutory defence like absence of licence is proved, it must be further proved by the Insurance Company that the damage the victim suffered flowed from the breach i.e. the breach contributed to the cause of accident. It is laid down by the Apex Court that the Insurance Company must prove that the breach was willful on

the part of owner. The degree of proof is also discussed by the Apex Court and it is observed that it depends upon the facts of particular case. The Apex Court has lastly laid down that even if willful breach of the terms and conditions referred in the statutory defence is proved (provided under section 149 (2) (a) of the Act), the Insurance Company must pay compensation to the third party first. It is observed that in view of the provisions of sections 149 (1), 149 (4) and 149 (5) of the Act, the Insurance Company can be allowed to recover the amount from the owner.

9. In the present case, the Insurance Company did not lead any evidence to discharge the burden mentioned by the Apex Court in Swarna Singh's case. The police papers show that crime at C.R. No. 222/2006 at Georai Police Station, District Beed was registered against the driver of the offending vehicle for offences punishable under sections 279, 338 and 304-A of Indian Penal Code. The F.I.R. shows that the crime was registered for offence under section 184 of the Act also. A copy of driving licence (Exh. 32) issued by police station is on the record and it shows that the driver had obtained licence to drive the motorcycle with gear and light motor vehicle. In view of the provisions of sections 133 and 134 of the Act, it can be said that it was the duty of the driver and the owner to inform the concerned including the Insurance Company about the accident and supply the information with regard to the licence. This fact, licence, is within the knowledge of the owner and the driver. It is the case of Insurance Company that no such information was supplied. The matter proceeded *exparte* against the owner. In view of these circumstances, adverse inference can be drawn against the owner of the offending vehicle and it can be presumed that the driver was not 'duly licenced' to drive the vehicle involved in the accident. In that case also, there was further burden on the Insurance Company to prove that this breach was responsible for the accident and the conduct of the owner was willful. Thus, even if the best possible case available for the Insurance Company is accepted, the Insurance Company cannot deny the liability to pay the compensation first to the third party though it was in the position to deny the right of reimbursement of owner. In view of law laid down by the Hon'ble Supreme Court in Swarn Singh's case, this Court holds that the Tribunal has committed error in not giving direction to the Insurance Company to pay the compensation first to the claimant. Thus, the decision of the Tribunal on this point needs to be set aside and corrected.

10. On the point of quantum of compensation, there is substantive evidence of claimant No. 1. However, the claimants have not examined the concerned witness for proving the salary income and for proving the certificate allegedly issued by the Sugar Factory. No evidence is given on the education of the deceased or to prove that he had some technical knowledge. The accident took place in the year 2006. In the year 2006, even a labour was in a position to earn Rs. 3,000/- per month. In view of the age of the deceased given in P.M. report, 45 years, it can be said that the age of the deceased was above 45 years. As per the law laid down in the case reported as (2013) 9 SCC 54 [Rajesh Vs. Ranbir] the aforesaid income of the deceased needs to be increased 30% for calculation of loss of dependency. Thus, the monthly income of the deceased can be presumed Rs. 3,900/-. In view of the ratio laid down in the case reported as (2009) 6 SCC 121 [Sarla Verma Vs. DTC] and the size of the family of the deceased [four adult members and two minor members] only 1/5 of the aforesaid amount can be deducted towards personal expenses of the deceased. Thus, only the amount of Rs. 780/- can be deducted from the income of Rs.3900/- and so there was monthly loss of Rs. 3120/-.

11. In view of the age of the deceased and the ratio laid down in the case of Sarla Varma cited supra, 13 can be adopted as multiplier for calculation of total loss of dependency.

The total loss of dependency comes to Rs. 4,76,720/- [3120 x 12 x 13]. In view of the law laid down in the case of Rajesh cited supra, the amount of Rs. 25,000/- can be given on the count of funeral expenses. Surprisingly, no amount is given under the other heads by the Tribunal. The amount of Rs. 10,000/- on the count of loss of consortium can be given as widow is the claimant. Thus, the total amount comes to Rs. 5,11,720/-. It appears that the nationalized banks are granting interest at the rate of 8.5% p.a. In view of the case reported as (2001) 2 Supreme Court Cases 9 [Kaushnuma Begum (Smt.) and Ors. Vs. New India Assurance Co. Ltd. and Ors.], this Court holds that interest can be granted at the rate of 8.5% p.a. on the enhanced amount. In the result, the following order.

ORDER

(i) The appeal is partly allowed with no order as to costs.

(ii) Judgment and award of Tribunal exonerating the Insurance Company from making payment of compensation is set aside.

(iii) The judgment and award is modified to enhance the compensation as follows :-

(a) Claim petition is allowed with costs.

(b) Respondent No. 1, owner, is made liable to pay the compensation of Rs. 5,11,720/- (Rs. Five lakh eleven thousand seven hundred twenty) to the claimant with interest at the rate of 8.5% p.a. and the interest would be payable from the date of petition till the date of realization. This amount includes the amount which was payable under the principal of 'no fault'.

(c) The Insurance Company is to pay first the entire amount of compensation with interest to the claimants.

(d) The Insurance Company will be entitled to recover the amount which it is required to pay to the claimants from the owner by using this decision.

(e) Out of the amount enhanced, 50% amount is to be given to the widow of the deceased and it is to be kept in fixed deposit of any Nationalized Bank for the period of six years. She is entitled to receive the quarterly interest on it. The remaining amount is to be disbursed amongst original claimant Nos. 1, 4 to 6, equally and that amount is to be given by account payee cheque.

(f) Claimants are to pay court fee on excess amount which is awarded to them.

(iv) Award is to be prepared accordingly.

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