

Vimlabai and ors. Vs. Sharif Khan and ors.

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Court : Madhya Pradesh

Decided On : Aug-24-2009

Reported in : (2010)ILLJ257MP; 2009(4)MPHT425

Judge : A.K. Patnaik, C.J., ;Subhash Samvatsar and ;Abhay M. Naik, JJ.

Appellant : Vimlabai and ors.

Respondent : Sharif Khan and ors.

Judgement :

ORDER

Abhay M. Naik, J.

1. Following questions are referred to this Full Bench:

(i) Whether, in an appeal for enhancement of compensation when there is no dispute about the liability of the Insurance Company, it is necessary to pass the award against all as they are jointly and severally liable ?

(ii) Whether the respondent No. 2-Owner of the disputed truck and respondent No. 3-Insurance Company both are jointly and severally liable to pay amount of compensation to appellants-claimants or respondent No. 3-Insurance Company is liable to pay the amount of compensation to the appellants-claimants ?

2. Facts relevant for the purpose of reference are in a narrow compass. Truck No. H.R. 38 D-1157 was owned by Satish Kumar (respondent No. 2) whereas the same was being driven at the relevant time by Sharif Khan (respondent No. 1). It was insured with the United India Insurance Company (respondent No. 3). Claimants/appellants are the legal heirs of the deceased Kapoorchand, who was travelling in Jeep No. MP07 H-4205, which met with an accident due to head on collision with the aforesaid truck. Kapoorchand, aged about 35 years, died due to injuries received by him in the accident. Claimants/ appellants being dependents of the deceased Kapoorchand, submitted a claim petition before the Claims Tribunal, Guna. It was found by the Claims Tribunal that the offending truck was being driven at the relevant time in a rash and negligent manner. Accordingly, an award was granted for compensation to the tune of Rs. 2,00,000/- (Rupees Two lacs only) against the owner and the Insurance Company since it could not be proved that the offending truck was being driven at the time of occurrence of the accident by the respondent No. 1.

3. Being aggrieved by the aforesaid award dated 31-7-04, passed by the learned Claims Tribunal, Guna, claimants submitted Misc. Appeal No. 915/04 before this Court for enhancement of compensation. Learned Division Bench after hearing the arguments enhanced the amount of compensation to the tune of Rs. 2,76,000/- alongwith interest @ 8% p.a. from the date of filing of the appeal till realisation. However, the learned Senior Judge of the Division Bench directed the respondent No. 3/United India Insurance Company alone to deposit the amount of award within a period of two months. Another learned Judge of the Division Bench opined that the respondent No. 2 (i.e., owner of the offending vehicle) is equally responsible with the Insurance Company in joint and several manner. On account of difference of opinion in the manner indicated above, the questions stated hereinabove are referred to this Full Bench.

4. We have heard the learned Counsel for the parties. Their submissions have been considered in the light of the law governing the situation.

5. The Motor Vehicles Act, 1939 has been repealed by the Motor Vehicles Act, 1988. Accident giving rise to the present matter took place on 7-4-2002, therefore,

obviously, it would be governed by the provisions of the current Act of the year 1988. Section 146 of the said Act makes it obligatory on the person using the motor vehicle in a public place to have a policy of insurance in accordance with the requirements of Chapter XI of the Motor Vehicles Act, 1988. Contents of the policy of insurance in order to comply with the requirements of Chapter XI are contained in Section 147. Section 149 casts a duty on the insurer to satisfy judgments and awards against persons insured in respect of third party risks. In the present case, it is not in dispute that the United India Insurance Company had issued a policy of insurance to indemnify the respondent No. 2 with respect to the offending vehicle, which was valid at the time of occurrence of the accident.

6. Precise questions involved herein are whether the owner of the offending vehicle may be exonerated from the liability of the compensation and whether the Insurance Company alone may be fastened with the liability of compensation.

7. Liability of owner of the offending motor vehicle to compensate the victim in a motor accident due to negligent driving of the offending vehicle is based on the Law of Torts. Compulsory insurance in respect of the third party risk is introduced in the Indian Law by introducing Chapter VIII in the Motor Vehicles Act, 1939. In the Motor Vehicles Act, 1988, Chapter XI is incorporated for the same purpose. In the earlier Act, Section 95 provided the requirement of policy and limits of liability in order to comply with the requirements of Chapter VIII (of Motor Vehicles Act, 1939). While dealing with the situation, the Supreme Court of India in the case of *Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr.* : AIR 1977 SC 1248, observed:

Under Section 95(1)(b)(i) of the Act, it is required that policy of insurance must be a policy which insures the person against any liability which may be incurred by him in respect of death or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. It may be noted that what is intended by the policy of insurance is insuring a person against any liability which may be incurred by him. The insurance policy is only to cover the liability of a person which he might have incurred in respect of a death or bodily injury. The accident to which the owner or the person insuring is liable is to

the extent of his liability in respect of death or bodily injury and that of death or bodily injury and that liability is covered by the insurance. It is, therefore, obvious that if the owner has not incurred any liability in respect of death, it is, therefore, obvious that if the owner has not incurred any liability in respect of death or bodily injury to any person there is no liability and it is not intended to be covered by the insurance. The liability contemplated arises under the law of negligence and under the principle of vicarious liability. The provisions as they stand do not make the owner or the Insurance Company liable for any bodily injury caused to a third party arising out of the use of the vehicle unless the liability can be fastened on him. It is significant to note that under Sub-clause (ii) of Section 95(1)(b) of the Act, the policy of insurance must insure a person against the death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Under Section 95(1)(b) Clause (ii) of the Act the liability of the person arises when bodily injury to any passenger is caused by or use of the vehicle in a public place. So far as the bodily injury caused to a passenger is concerned it need not be due to any act or liability incurred by the person. It may be noted that the provisions of Section 95 are similar to Section 36 (1) of the English Road Traffic Act, 1930, the relevant portion of which is to the effect that a policy of insurance must be policy which insures a person in respect of any liability which may be incurred by him in respect of death or bodily injury to any persons caused by or arising out of the use of the vehicle on road. The expression 'liability which may be incurred by him' is meant as covering any liability arising out of the use of the vehicle. It will thus be seen that the person must be under a liability and that liability alone is covered by the insurance policy.

8. Policy of insurance is a contract between the insurer and insured to indemnify the insured from the liability which will be fastened upon the latter on account of the accident resulting from the use of his motor vehicle. Sections 124 and 125 of the Indian Contract Act, 1872 may be reproduced hereinbelow for convenience:

124. 'Contract of indemnity' defined.- A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity'.

125. Rights of indemnity-holder when sued.- The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor:

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

9. Perusal of the aforesaid goes to show that the liability of the indemnifier to indemnify would arise only if the same is fastened upon the person who has to be indemnified. If no liability is fastened upon such person, there would be no occasion to indemnify him. Thus, it may, indeed, be concluded that in case of negligence on the part of the offending motor vehicle, the liability of compensation shall have to be fastened alongwith the Insurance Company on the owner also and consequently the Insurance Company alone cannot be made liable to make payment of compensation.

10. While dealing with the liability of owner and driver, the Supreme Court of India in a recent case of *Machindranath Kernath Kasar v. D.S. Mylarappa* : AIR 2008 SC 2545 has observed:

When a damage is caused upon act of negligence on the part of a person, the said person is primarily held to be liable for payment of damages. The owner of the vehicle would be liable as he has permitted the use thereof. To that effect only under the Motor Vehicles Act, both driver and owner would be jointly liable.

In a more recent case of *Samundra Devi and Ors. v. Narendra Kaur and Ors.* 2009 (2) JLJ 161 (SC), the Apex Court has further clearly observed:

A contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefor. In a case involving a third party to the contract of insurance in terms of Section 147 of the Motor Vehicles Act, 1988 providing for a compulsory insurance, the insurer becomes statutorily liable to indemnify the owner. Indisputably, the Insurance Company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages of property.

11. Hon'ble Supreme Court of India in the case of *Oriental Insurance Co. Ltd. v. Sunita Rathi* AIR 1998 SC 257, has already observed:

It follows that the insurer cannot be held liable on the basis of the above policy in the present case and, therefore, the liability has to be of the owner of the vehicle. However, we find that the High Court, without assigning any reason, has simply assumed that the owner of the vehicle was not liable and that the insurer alone was liable in the present case. This conclusion, reached by the High Court is clearly erroneous. The liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance. There is, thus, a basic fallacy in the conclusion reached by the High Court on the point.

12. We may also successfully refer to the decision of High Court of Karnataka in the case of *United India Insurance Co. Ltd. v. S. Siddeswara and Anr.* : 2001 ACJ 1621, wherein it is clearly held that once the owner himself is not found liable, making the claim against the Insurance Company does not arise.

13. No contrary view could be pointed out during the hearing.

14. Ex consequenti, Question of Law No. 1 is answered that Chapter 11 of the Motor Vehicles Act, 1988 does not empower the Tribunal or Court to fasten the liability of compensation on the Insurance Company alone. Question of Law No. 2

is also answered that the liability for payment of compensation is to be necessarily fastened on respondent Nos. 2 and 3 in joint and several manner, due to valid policy of insurance in favour of the respondent No. 2. Matter may be now placed before the Division Bench to decide the appeal accordingly.

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