

Sureshchand Vs. Phulsingh and ors.

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Court : Madhya Pradesh

Decided On : Mar-18-1992

Reported in : 1995ACJ262

Judge : V.D. Gyani, J.

Appeal No. : M.A. No. 37 of 1984

Appellant : Sureshchand

Respondent : Phulsingh and ors.

Advocate for Def. : Sujan Jain and ; V.V. Dandwate, Advs.

Advocate for Pet/Ap. : N.P. Sharma, Adv.

Disposition : Appeal allowed

Judgement :

V.D. Gyani, J.

1. This appeal is directed against award dated 5.10.1983 passed by the Member, Motor Accidents Claims Tribunal, Rajgarh, in claim case No. 22 of 1980 thereby dismissing appellant's claim on the ground that the claimant-appellant had failed to prove negligence of tractor driver, respondent No. 2.

2. Briefly stated, the facts of the case are:

That on 6.9.1979 respondent No. 2 was driving a tractor bearing registration No. CPC 8689, a trolley was also attached to it. The claimant-appellant was engaged on daily wages along with other labourers. Respondent No. 2 was driving the tractor while the appellant was sitting in the trolley. On the date of accident it had gone about 8 or 9 miles ahead of Pachore for transporting gitty. The tractor got stranded in a nalla near Bheelkheda. The appellant was asked by respondent No. 2 to remove the rod of the trolley. In his bid to remove the same the respondent No. 2, acting unmindful and negligent of the fact whether the rod had been removed or not, started the tractor and slightly moved ahead with the result that the connected rod fell on the left leg of the appellant resulting in following injuries:

(i) Crushing injury in the left thigh, with crushing of skin, muscles, fascia and fracture of the shaft of the left femur, measuring 4' x 3' x 2'. The wound was soiled with dust and grass.

(ii) Swelling in the left ankle. The movement of left foot was restricted.

(iii) Nail of the right ring finger was completely crushed.

These injuries were grievous in nature.

3. In order to prove his case the claimant-appellant examined Jagannath, AW 1 and Beeram, AW 2. Dealing with the evidence of AW 1 and AW 2, the Tribunal has come to the conclusion that they do not support appellant's case and so far as the evidence of appellant is concerned, the Tribunal in para 13 of the impugned award has noted that he was an interested witness and, therefore, no reliance can be placed on his statement and ultimately came to the conclusion that it was not proved by the appellant that respondent No. 2 was negligent in driving the tractor ahead.

4. Mr. N.P. Sharma, learned Counsel appearing for the appellant, has assailed this finding recorded by the Tribunal as based on most unreasonable approach to the evidence available on record and submitted that the Tribunal has completely overlooked the definition of 'proved' under Section 3 of the Evidence Act.

5. Mr. Sujan Jain, the learned Counsel appearing for respondent No. 1, has supported the finding that negligence was not proved and alternatively submitted that in case this Court comes to the conclusion that the negligence on the part of respondent No. 2 is established, the respondent, New India Assurance Co. Ltd., should be held liable. He has placed a photostat copy of the insurance policy on record along with an application under Order 41, Rule 27, Civil Procedure Code, read with Section 151, Civil Procedure Code. Placing reliance on a Full Bench decision of this Court in United India Fire & Genl. Ins. Co. Ltd. v. Natvarlal 1988 ACJ 956 (MP), it was also urged that this additional documentary evidence should be taken on record and considered for disposal of this appeal.

6. Mr. V.V. Dandwate, learned Counsel appearing for the respondent insurance company, on the other hand, submitted that in face of the plea taken by the owner, even if the insurance policy as filed in this Court is considered as additional evidence, yet in face of the condition that only tractor was insured for agricultural and forestry purpose, as is evident from the policy, the respondent insurance company cannot be held liable. On his own pleadings the respondent No. 1 had come out with a case that it was engaged for transporting rubble and boulders.

7. It may be noted that in view of the finding recorded on issue No. 3, pertaining to negligence, the rest of the issues have not been decided by the Tribunal. The first question, therefore, is whether appellant has proved negligence on the part of the respondent No. 2, the tractor driver?

8. The definition of 'proved' under Section 3 of the Evidence Act reads as follows:

'Proved'-A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

9. It is in light of this definition that the evidence on the point as adduced by the appellant has to be got appreciated. The approach of the Tribunal, to say the least, is too technical and not of a prudent man.

10. The Supreme Court, on the question of appreciation of evidence, has, in *Awadh Behari Burma v. State of M.P.* AIR 1956 SC 738, pointed out the correct approach in a matter of this kind to determine the crucial issue not on a mere balance of oral evidence but on broader considerations and clear probabilities.

11. In a matter of this kind oral evidence is likely to be honestly discrepant and the question is not one of weighing the reliability of witnesses. The other two witnesses, Jagannath and Beeram, have corroborated the appellant who was asked by respondent No. 2 to jack up the tractor so as to detach the connecting rod of the trolley. Even before the rod was disengaged, the driver started the tractor as a result of which the connecting rod fell on his leg. The jack also gave way, The trolley loaded with rubble, also fell to the ground. The act of the driver in moving the tractor ahead, without knowing whether the connecting rod had in fact been disengaged, was certainly an act of utter negligence. It is significant to note that the driver despite service of notice had chosen to remain *ex pane*.

12. The Tribunal was palpably wrong in holding that negligence was not proved. This finding is based on misappreciation of evidence as well erroneous assumptions of law. It is, therefore, liable to be set aside and is accordingly set aside.

13. Just look at the perversity of the approach in denouncing the claimant as an interested witness. The accident takes place in the afternoon at a distance of about 10 km. from Narsinghgarh, the appellant is rushed to District Hospital, Narsinghgarh. The claimant-appellant is examined and treated by an Asstt. Surgeon on duty at 3.30 p.m. as per injury report, Exh. PA-1 and he is found to have sustained the injuries noted above. The learned Member of the Tribunal says, he is an 'interested' witness. What 'interest' could he have in sustaining such grievous injuries? The medical evidence is clinching. The appellant had sustained fracture of the femur and talus bones. The fracture was visible by naked eye, as deposed to by Dr. Jain, AW 4, who has further opined that this fracture has resulted in permanent disability to the injured and will adversely affect his capacity to earn his livelihood. The X-ray plates, Exhs. A-1 to A-5, show comminuted fracture of femur and talus bones.

14. The Member, Motor Accidents Claims Tribunal, has copiously quoted from the evidence of Jagannath and Beeram. Jagannath has deposed to the fact that the connecting rod of the trolley had fallen on appellant's leg while he was operating the jack. Beeram, PW 2, has also deposed to this fact. Suresh, the appellant, in his evidence has stated that the driver moved the tractor while he was operating the jack. The learned Member of the Tribunal has denounced his evidence as that of an interested witness; but for no reason or rhyme. Merely because he has come out with a claim, he cannot be denounced as an interested witness. The injuries as found on immediate medical examination amply corroborate his case. He has deposed to the fact that respondent No. 2 moved the tractor. The learned Member has disbelieved him on this point solely on the ground that the other two witnesses have not stated this fact in their evidence. It is significant to note that not a single question has been put to the appellant in his cross-examination on this vital point. Approach of the learned Member of the Tribunal is peribolusly bordering on perversity. No one is so interested as to get his limbs crushed under a tractor-trolley so as to come out with a false claim for compensation. The Tribunal should have seen the injury report, Exh. PA-1, before denouncing him as an interested witness.

15. As for earning the appellant, Suresh, has stated on oath that at the time of accident his average income was Rs. 400/- to Rs. 500 per month and as a result of the fracture sustained by him, he cannot earn anything. This statement has remained unchallenged in cross-examination. He also used to work in a small tea stall, run by his father at the bus stand in Narsinghgarh. In his cross-examination he has admitted that Raju, respondent No. 2, the drivers/had engaged him on daily wage of Rs. 4/-.

16. The other two witnesses, Jagannath and Beeram, were also engaged on daily wage basis. In his claim, the appellant has averred that he used to earn Rs. 10/- per day and at the time of accident his age was only 21 years. The minimum wage as provided under the Act, even at the time of accident, cannot be less than Rs. 13/- (and it is Rs. 18 at present). Making all reasonable concession and excluding the vagaries of nature, chances of employment as prevailing in the area, it would not be unreasonable to assess his average income from daily wages at a

minimum of Rs. 300/-. But for the accident and injuries sustained by him he would have continued to earn his daily wages even as labourer, for another 30-35 years. His annual average minimum income which he would have earned for the rest of his life can be assessed at Rs. 4,000/-; taking the minimum figure of 30, it comes to Rs. 1,20,000/-. Making all reasonable deductions, and considering the fact of a lump sum payment, an award of Rs. 60,000/- (sixty thousand) would fetch him the income which he would have otherwise earned by way of interest at the prevailing bank rate, if a substantial part of this amount of award is deposited for a fixed term in a nationalised bank. Appellant is accordingly awarded Rs. 60,000/- (sixty thousand) as compensation recoverable jointly and severally from the respondents. As for special damages claim, the appellant has stated on oath that he had to incur expenses for his treatment, an amount of Rs. 5,000/- (five thousand) which is quite reasonable and has also not been challenged in his cross-examination. This amount of Rs. 5,000/- (five thousand) is also awarded to the appellant as compensation.

17. Mr. Dandwate, learned Counsel for the appellant, argued that in view of the restricted user of the tractor, for agricultural and forestry purpose, the insurance company is not liable.

18. Mr. Sujan Jain, appearing for the respondent No. 1, stressed the liability of the insurance company. In this connection it would not be out of place to note certain peculiar features of the stand taken by the owner of tractor and insurance company, the insurer of the tractor. In his written statement in para 1, the respondent No. 1 has categorically stated that the tractor was insured with the New India Assurance Co. Ltd., respondent No. 3; but when it came to evidence, he made wavering statement that he did not remember the name of the insurance company. It was only on 16.3.1992 that he had come out with an application under Order 41, Rule 27, Civil Procedure Code, placing the policy on record the owner had taken the plea that his tractor was stolen by someone but surprisingly enough he did not even lodge a report about it. In a nutshell every possible plea was raised to defeat appellant's claim. The owner, Phulsingh, in his evidence has stated that his son had accompanied the appellant to Bhopal for his treatment and had also spent some money. But he did not know the exact amount spent. What a

benevolence on the part of the owner! In one breath he denies and makes every possible attempt to defeat the claim and in another he comes out to a charity through his son. This written statement was filed by owner, respondent No. 1, on 7.7.1980. The insurance company, respondent No. 3, filed its written statement a year thereafter on 21.7.1981. As is evident from IA 2, available on the record and the order sheet dated 21.7.1981. This written statement also contains every possible plea of evading of liability and surprisingly enough it is filed in face of the categorical statement made by the insured in his written statement in para 1; yet there is a denial. And a very evasive statement that for want of knowledge and filing of insurance policy, the insurance company was not in a position to make any categorical statement. What more specific pleadings can there be? When the insured owner had come out with a clear statement that the tractor in question was insured with the respondent No. 3.

19. So far as insurance is concerned, respondent No. 3 comes out with a blatant denial but for driving licence of respondent No. 2, the same insurance company makes a categorical statement in its special pleadings that the driver, respondent No. 2, had no valid licence of driving. When the insurance company was not aware of the insurance policy issued by it, how could the same company come out with such a categorical statement that the driver of the tractor was not having a valid licence to drive the tractor.

20. There is yet another special plea taken that the defendant, respondent No. 1, had insured the tractor in question only for the specific purpose of agriculture and forestry and so long it was not established, the insurance company cannot be held liable. This pleading clearly indicates the collusive attitude of both the insurance company as well as the insured. It is this attitude which has been the subject-matter of criticism in various judgments. It is regrettable that a nationalised institution should come out with such evasive replies and returns and indulge in collusive practices.

21. No doubt the burden to prove special plea raised in the written statement of the insurance company was on the party raising such pleas. The insurance company has not adduced any evidence in proof of its pleas. It takes years

together to file the written statement possibly just watching as to what stand is taken by the insured owner. This attitude and approach on the part of the insurance company deserves to be deprecated.

22. Even if the application under Order 41, Rule 27, Civil Procedure Code and the photostat copy of the insurance policy, filed by the owner, respondent No. 1, were to be excluded, yet there is evidence enough to hold the insurance company liable for payment of compensation.

23. In the result, this appeal deserves to be allowed; it is accordingly allowed with costs. Counsel's fee Rs. 2,000/- (two thousand). The appellant is held to be entitled to compensation to the tune of Rs. 60,000/-(sixty thousand) and Rs. 5,000/- (five thousand) special damages, totalling Rs. 65,000 (sixty-five thousand) with interest at the rate of 12 per cent per annum from the date of application for compensation till its actual recovery, or payment.

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