

Gorlibai Vs. Kailash and ors.

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Court : Madhya Pradesh

Decided On : Jun-17-2008

Reported in : 2009ACJ2295

Judge : N.K. Mody, J.

Appellant : Gorlibai

Respondent : Kailash and ors.

Advocate for Def. : Mr. Sameer Verma, Mr. H.C. Jindal

Advocate for Pet/Ap. : Mr. Pankaj Sohani

Judgement :

N.K. Mody, J.

1. This order shall also govern the disposal of Miscellaneous Appeal No. 1652 of 2006 as both the appeals arise out of one award dated 17.2.2006 passed by the First Additional M.A.C.T., Khargone in Claim Case No. 6 of 2005 whereby the claim petition filed by appellant was allowed and a sum of Rs. 3,26,300 has been awarded.

2. In Miscellaneous Appeal No. 1677 of 2006 the appellant is aggrieved by the inadequacy of the amount awarded and is also aggrieved by the direction of learned Tribunal whereby respondent No. 3 has been exonerated. In

Miscellaneous Appeal No. 1652 of 2006 appellants are the respondent Nos. 1 and 2. The grievance of respondent Nos. 1 and 2 is also that the respondent No. 3 has wrongly been exonerated and the amount awarded is on the higher side.

3. Short facts of the case are that the appellant Gorlibai filed a claim petition alleging that on 30.1.2004 appellant was travelling in Commander jeep at about 3.45 p.m., which was being driven by respondent No. 1 rashly and negligently, owned by respondent No. 2 and insured with respondent No. 3. It was alleged that because of rash and negligent driving of respondent No. 1 the offending jeep turned turtle, with the result appellant sustained grievous injuries in her leg, knee and on other parts of the body. Appellant was brought to District Hospital, Khargone, where appellant was hospitalised from 31.1.2004 to 22.9.2004. It was alleged that since the accident occurred because of rash and negligent driving of respondent No. 1, therefore, claim petition be allowed and compensation be awarded.

4. The claim petition was contested by respondent Nos. 1 and 2 and also by the respondent No. 3 by filing separate written statements. The defence of the respondent No. 3 was that since the offending vehicle which was registered as private vehicle was being used for commercial purpose, therefore, in the facts and circumstances of the case respondent No. 3 be exonerated.

5. After framing of issues and recording of evidence learned Tribunal allowed the claim petition filed by the appellant and awarded a sum of Rs. 3,26,300 and exonerated the respondent No. 3 against which both the appeals are filed.

6. Mr. Pankaj Sohani, learned Counsel for the appellant submits that appellant was hospitalised roughly for a period of 8 months. It is submitted that the appellant sustained compound fracture in right leg and also crush injuries with the result that the leg of the appellant is of no use. It is submitted that learned Tribunal assessed the amount of permanent disability on the basis of 100 per cent loss of earning capacity. It is submitted that learned Tribunal awarded a sum of Rs. 3,26,300, break-up of which is as under:

Towards permanent disability Rs. 2,88,000 Towards medical expenses Rs. 38,300

7. Learned Counsel for appellant submitted that on number of heads no amount has been awarded and the income of the appellant assessed by the learned Tribunal is also on lower side as the accident is of the year 2004. So far as exoneration of respondent No. 3 is concerned, the learned Counsel submits that appellant herself has stated that she was not fare-paying passenger. Learned Counsel submits that learned Tribunal committed error in relying on the statement alleged to have been given by the appellant before the police authorities under Section 161 of Criminal Procedure Code and exonerated respondent No. 3 which is not permissible under the law.

8. Mr. Sameer Verma, learned Counsel for the respondent Nos. 1 and 2 submits that the amount awarded by the learned Tribunal is already excessive and no case for enhancement is made out. So far as exoneration of respondent No. 3 is concerned, the learned Counsel submits that respondent No. 3 appointed investigator, who had also submitted the investigation report in the office of respondent No. 3, but neither investigator was examined nor the investigation report has been filed by the respondent No. 3 for the reasons best known to the respondent No. 3. It is submitted that the learned Tribunal committed error in placing reliance on the statement given by the appellant and other witnesses under Section 161 of Criminal Procedure Code to the police authorities. It is submitted that the moment appellant who is injured has stated before the learned Tribunal on oath that she has not stated that she was fare-paying passenger before the police authorities, no weightage could have been given on this statement given to the police. For this contention, the learned Counsel placed reliance on a decision in the case of *Bhanwar Lal Verma v. Sharad Tholia* : 2007 ACJ 52 (Rajasthan), wherein Hon'ble High Court of Rajasthan, Jaipur Bench has held that conclusions drawn by the Tribunal are based on progress and failure of criminal case. Outcome of claim proceedings would not be correlated to and would not depend on the outcome of criminal proceedings. It was further observed that Tribunal is expected to adjudicate a case on the basis of evidence produced before it without giving too much importance to the outcome of criminal trial.

9. Further reliance is placed on a decision of Madras High Court in the matter of *R. Duraisamy v. D. Arumugam* : 2007 ACJ 571 (Madras), wherein it was held that

proceedings of criminal case are not binding on the Tribunal and the Tribunal has to rely upon the material placed before it and has to come to an independent conclusion.

10. Mr. H.C. Jindal, learned Counsel for respondent No. 3, supports the contention of the learned Counsel for respondent Nos. 1 and 2, so far as it relates to the amount of compensation and submits that no case for enhancement is made out as the amount awarded is already on higher side. Learned Counsel submits that learned Tribunal has rightly exonerated the respondent No. 3. It is submitted that the statement recorded by the police authority under Section 161, Criminal Procedure Code are Exhs. NA2 to NA9, wherein the police authority has recorded the statement of Ramkubai, who is appellant herein, Hemabai, Sukhadibai, Sukalyabai, Dabarsingh and Sonabai. It is submitted that all the statements have been recorded at one time and in all the statements it is stated that the persons who were travelling in the offending jeep were fare-paying passengers. It is submitted that the statement of criminal case has rightly been believed by the learned Tribunal. Apart from this it is stated that since appellant herself has filed the document relating to the criminal case, therefore, the same cannot be discarded on the ground that the appellant has stated that she has never given such type of statement to the police authority. It is submitted that the appellant herself has come in witness-box and admitted that the offending vehicle is being plied on the same route on daily basis. It is submitted that this part of the statement and also the fact that 5 to 6 persons were injured in the said accident is sufficient to establish that appellant was travelling in the said jeep as a fare-paying passenger. It is submitted that since 15 to 16 passengers were travelling in the offending jeep at the relevant time and 5 to 6 persons were injured, therefore, all of them filed claim petitions but the respondent No. 2 settled the claim cases out of the court against all the other claimants except the appellant. It is submitted that this itself is sufficient that respondent No. 2 was well aware that he was responsible for payment of compensation as the vehicle was being driven in violation of terms and conditions of the insurance policy. Learned Counsel placed reliance on a decision of Division Bench of this Court in the matter of Hamid Khan v. Guddibai : 2003 ACJ 521 (MP), wherein the jeep was insured for self use but 12 to 13 fare-paying passengers were being carried in it, a Division Bench of this

Court held that insurance company is not liable and owner and driver of the vehicle are liable for payment of compensation.

11. Further reliance is placed on a decision of this Court in the matter of Pushpa Bai v. Gulab Chand Vaishya : 2008 ACJ 560 (MP), wherein the insurance company has disputed the liability on the ground that the policy does not cover the risk of passengers and the vehicle was used for commercial purposes for hire, this Court held that insurance company has rightly been exonerated.

12. Further reliance is placed on a decision of Supreme Court in the matter of Dr. T.V. Jose v. Chacko P.M. 2001 ACJ 2059 (SC), wherein a death case of gratuitous passenger in a car, Hon'ble Apex Court has held that a third party policy does not cover liability to gratuitous passengers who are not carried for hire or reward.

13. Reliance was also placed on a decision of Calcutta High Court in the matter of New India Assurance Co. Ltd. v. Naba Kumar Mondal 2006 ACJ 238 (Calcutta), wherein the contention of the insurance company was that the vehicle insured for private purpose was used for carrying passengers on hire, it was held that since there was breach of specified condition of policy and insurance company is absolved from its liability and owner alone is liable for payment of compensation.

14. Learned Counsel further placed reliance on a Full Bench decision in the matter of United India Insurance Co. Ltd. v. Celinamma : 2003 ACJ 623 (Kerala), wherein Kerala High Court has held that in a case of private vehicle insurance company is liable for death of or injuries sustained by person carried in a private vehicle gratuitously, insurance company is not liable.

15. Lastly the learned Counsel placed reliance on a decision of Full Bench of this Court in the matter of Bhav Singh v. Savirani : 2008 ACJ 1043 (MP), wherein it was held that any person other than the insurer and insured are included within the term of third party. The insurer, however, would not be liable for any bodily injury or death of a third party in an accident unless the liability is fastened on the insurer under the provisions of Section 147 of the Act or under the terms and conditions of the policy of insurance. Hence, the mere fact that a passenger is a

third party would not fasten liability on the insurer unless such liability arises under Section 147 of the Act or under the terms and conditions of the insurance policy.

16. From perusal of the record, it appears that the F.I.R. which is Exh. A1 was lodged by one Ramyash Tiwari who was not travelling at the relevant time in the offending jeep. In the F.I.R. it is nowhere stated that the appellant was travelling in the offending jeep as a fare-paying passenger. N.A. Nos. 2 to 9 are the statements of Ramkubai, Hemabai, Jhulu Bai, Rukhdi Bai, Jhabar Singh, Sona Bai and Gorlibai, who is appellant, which were recorded by the police between 30.1.2004 and 4.2.2004. The appellant has examined herself as AW 1 and Dr. D.P. Joshi, AW 2. While the insurance company, respondent No. 3, has examined Krishnalal, NAW 1; Ramyash Tiwari, NAW 2; Arun K. Singh, NAW 3 and Manoharlal himself has come in the witness-box as NAW 1. Gorlibai (appellant herein), AW 1 has specifically denied that she was a fare-paying passenger. She has also denied that she has given the statement to the police to the effect that she paid a sum of Rs. 5 as fare. Ramyash Tiwari who is the sub-inspector of police, has admitted in his statement that at the time of recording of the statement Gorlibai was in the hospital and was grievously injured. S.I. Ramyash Tiwari has not stated in his examination-in-chief that he has recorded the statement of Gorlibai relating to payment of fare. Respondent No. 3 has not taken any steps for calling the record of criminal case and also did not controvert the appellant to the effect that she has stated to the police authorities that she was a fare-paying passenger. For the purpose of contradiction it was necessary for the respondent No. 3 to call the original record of the criminal case, which was containing the statement of appellant. Only on the basis of admission of appellant to the effect that the offending vehicle passes through that route on daily basis, it cannot be said that the appellant was a fare-paying passenger. Manoharlal who is respondent No. 2 herein, has examined himself and he has stated that he was himself travelling in the offending jeep at the relevant time. He has further stated that the appellant was working at her place and he was knowing the appellant, therefore, appellant was allowed to travel in the offending jeep. Manoharlal was cross-examined by respondent No. 3 and it has been suggested by the respondent No. 3 that in connivance with police party, statement of the appellant was got changed. Statement of the appellant, Exh. NA9, is original statement or the changed

statement could have been proved only by calling the original record of the criminal case for which no steps have been taken by the respondent No. 3.

17. It is true that some other claim cases were also filed by the claimants who were travelling in the offending jeep and the matters were settled by the respondent No. 2 out of the court. But, only on the basis of this it cannot be said that the appellant was a fare-paying passenger. Respondent No. 3 did not bother to call the other passengers who were travelling at the relevant time to prove the fact that they were fare-paying passengers. It is not in dispute that respondent No. 3 has appointed an investigator who has also submitted investigation report. Neither the investigation report has been filed nor investigator was examined.

18. In the peculiar facts and circumstances of the case, in the opinion of this Court learned Tribunal has committed error in exonerating the respondent No. 3.

19. So far as the compensation is concerned, looking to the injuries sustained by the appellant, the amount awarded by the learned Tribunal appears to be just and reasonable which requires no enhancement. In view of this the appeal filed by the appellant stands allowed in part. Findings of the learned Tribunal so far as it relates to the exoneration of respondent No. 3 is concerned stands set aside. The liability of payment of compensation of respondent No. 3 shall be joint and several with the respondent Nos. 1 and 2. Learned Tribunal is directed to deposit 80 per cent of the amount awarded in the name of appellant in a nationalised bank having its branch office nearest to the residence of appellant with a further direction to the concerned branch not to allow any loan on the amount of F.D.R. and interest shall be payable to the appellant on monthly basis by crediting the same in her savings bank account.

20. With the aforesaid directions this appeal stands disposed of. No order as to costs.