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Court : Madhya Pradesh

Decided On : Jul-20-2001

Reported in : 2003ACJ383; 2001(3)MPLJ548

Judge : S.P. Srivastava and ;N.G. Karambelkar, JJ.

Appeal No. : M.A. No. 206 of 1992

Appellant : Pushpa Devi and ors.

Respondent : Kamal Singh and ors.

Advocate for Def. : R.P. Gupta and ; B.N. Malhotra, Advs.

Advocate for Pet/Ap. : S.S. Bansal, Adv.

Judgement :

S.P. Srivastava, J.

1. Feeling aggrieved by an award of Motor Accidents Claims Tribunal under the proceedings under Section 110-A of Motor Vehicles Act, 1939, whereunder as against the claim of compensation to the extent of Rs. 6,88,000 by the present claimants-appellants, they had been awarded an amount of Rs. 2,16,000 and that too against the owner and driver of the offending motor vehicle which was a tractor exonerating the insurer company, they have now come up in appeal praying for modification of the award and grant of the amount of compensation as prayed for

against not only the owner and driver but also against the insurer.

2. We have heard the learned Counsel for the parties and have carefully perused the record.

3. The facts in brief shorn of details and necessary for the disposal of this appeal lie in a narrow compass: Dwarika Prasad the husband of the appellant No. 1 and the father of the other appellants died in an accident involving the offending motor vehicle, tractor bearing registration No. CPH 6414 on 30.7.1985.

4. The present appellants submitted an application under Section 110-A of the Motor Vehicles Act, 1939, on 26.8.1985 raising a claim for compensation of an amount of Rs. 6,88,000. In their application, it had been asserted that Dwarika Prasad, the deceased was aged 32 years at the time of his death and was hale and hearty. It was also asserted that the deceased was running a shop of 'kirana and parchun' in the village Salon of Block Bhandar from which business he was earning Rs. 2,000 per month. It was further asserted that the deceased was travelling in the offending tractor along with several other persons of the village as passengers while going to have a darshan of Kaksi Hanumanji. The tractor was being driven in a rash and negligent manner with quite a speed. There was a trolley attached to the tractor in which other persons were sitting who had asked the driver to run the tractor slowly but he did not listen. It was also asserted that during the way the brakes were applied all of a sudden with the result that Dwarika Prasad, the deceased fell down from the tractor and was run over by the wheel of the trolley and died.

5. Pushpa Devi, wife of the deceased who disclosed her age to be 32 years was examined as PW 1 in support of the case of the claimants. In her deposition, she had stated that her husband used to run a flour mill also besides running the shop of 'parchun and kirana' and gave her Rs. 2,000 per month for household expenses. She admitted the fact that the deceased was also running a flour mill was being disclosed for the first time before the Tribunal. In para 6 of her deposition, she admitted that at the time of the death of Dwarika Prasad, he was aged 40 years.

6. Hardas was examined by claimants as PW 2. He claimed to be co-passenger travelling in the said tractor along with the deceased at the relevant time. He had stated that the trolley was attached with the tractor. Dwarika Prasad, the deceased was sitting on the tractor itself and was run over by the wheel of the trolley after he had fallen down. It was also stated that there was a mela in Kaksi near the temple of Hanumanji and all the passengers were going to the mela. He had also stated that Dwarika Prasad had 20 bighas of agricultural holding from which he earned about Rs. 30,000 per annum. Apart from that he was running a flour mill from which he earned Rs. 1,000 to Rs. 1,500 per month. It was further stated that the deceased was also running a 'parchun' shop from which he was earning Rs. 20,000 to Rs. 25,000 per annum. In para 5 of his deposition, he had stated that a wooden plank had been put on the mudguards of the tractor on which 5 passengers were made to sit. It was further stated that he was sitting by the side of Dwarika Prasad on the tractor itself. Kamal Singh who had the driving licence was driving the tractor.

7. Dwarka Prasad s/o Narayandas, one of the close relations of the deceased Dwarika Prasad was also examined as PW 3. He claimed to be sitting in the trolley attached with the offending tractor. He admitted that when the brakes were applied suddenly, Dwarika Prasad, the husband of the appellant No. 1 had fallen down and was run over by the wheel of the trolley attached with the tractor.

8. The claim put forward by the appellants was contested by the owner by filing a separate written statement. It was also contested by the insurer company by filing a separate written statement.

9. In the aforesaid written statements various pleas were raised.

10. It may be noticed that the insurance policy undertaking the liability to pay the compensation by the insurer company had been brought on the record.

11. In the aforesaid insurance policy, it was clearly stipulated that the tractor should be used for the agricultural and forestry purposes and the policy did not cover the use of the motor vehicle for hire or reward or for racing or for making reliability trial or speed testing and in case of the use of the motor vehicle while

drawing a greater number of trailers in all than is permitted by law.

12. It may further be noticed that in the post-mortem report of the deceased, Dwarika Prasad s/o Nathuram Vaishya performed on 31.7.1985, his age had been shown to be 37 years.

13. The Tribunal in its impugned order after considering the evidence and the materials brought on record had come to the conclusion that it was well established that the deceased and other persons were sitting in the tractor and there were many others sitting in the trolley. The driver of the tractor while driving the vehicle failed to observe the rule of prudence which is expected to be followed by the driver. It was also found that the deceased was also negligent as it was expected that when he had chosen to sit on the tractor, he should have taken care of himself but he failed to do so. The proximate cause of accident was found to be rash and negligent driving of the driver and also of the deceased. Taking note of the admissions of Pushpa Devi, the wife of the deceased that he was aged 40 years at the time of his death and the fact that in the post-mortem report his age was shown to be 37 years, the Tribunal rightly came to the conclusion that the age of the deceased could be safely held to be 37 years.

14. The correctness of the observation of the Tribunal that in the post-mortem report, the age of the deceased was shown to be 32 years is belied from a perusal of the photocopy of the same which was brought on the record on 6.5.1986 which shows that his age was recorded to be 37 years.

15. In any view of the matter, the appellants cannot be held to be prejudiced in the matter relating to the determination of the age of the deceased as according to the own statement of the wife of the deceased, his age was 40 years at the time of his death.

16. The learned Counsel for the appellants has tried to urge that the age of the deceased ought to have been held to be 32 years only at the time of his death. This contention cannot be accepted in face of the clear cut and categorical admission of the wife of the deceased to which a reference has already been made hereinabove.

17. The Tribunal had further come to the conclusion that the income of the deceased was only Rs. 1,500 per month. This finding taking into consideration the facts and circumstances brought on record is not liable to be disturbed. The Tribunal had taken into consideration the relevant factors while coming to the conclusion in regard to the assessment of the income of the deceased.

18. The Tribunal found the extent of dependency to be Rs. 14,400 per annum holding that an amount of Rs. 300 out of Rs. 1,500 must have been spent by the deceased on himself. Nothing substantial has been brought to our notice which may justify any interference in the aforesaid finding.

19. The Tribunal has applied the multiplier of 15 for determining the quantum of compensation placing reliance upon the decision of this Court in the case of *State of Madhya Pradesh v. Ashadevi*, 1988 ACJ 846 (MP).

20. Taking into consideration the age of the deceased and further the age of the dependants of the deceased along with the other material facts and circumstances brought on record, we are not inclined to take a different view. The finding in this regard arrived at by the Claims Tribunal is affirmed.

21. Learned counsel for the appellants has strenuously urged that in the present case, the insurer company should not have been exonerated in view of the provisions contained in the Motor Vehicles Act, 1939, which casts a statutory liability on the insurance company to pay the amount of compensation.

22. It may be noticed that the status of the insurer in law so far as the statutory liability sought to be fastened upon him under the Act cannot be more than that of a guarantor and he acts as a security for the third party with respect to its realising damages for the injuries suffered but a right to get any amount paid in excess is refunded to it by the insured stands secured. The ultimate burden always remains cast or fastened on the insured-owner of the motor vehicle.

23. As has already been noticed herein-above, the terms and conditions of the insurance policy clearly stipulate that the insurer will not be liable to pay any compensation in case the motor vehicle in question was used for any purpose

other than the agricultural and forestry. It was also clearly stipulated that the policy did not cover the liability of compensation in case of the use of the vehicle for hire and reward.

24. However, there is another aspect of the matter which is of considerable importance so far as the controversy raised in this appeal is concerned and it cannot be lost sight of.

25. In a recent decision, the Supreme Court in the case of Oriental Insurance Co. Ltd. v. Cheruvakkara Nafeessu, 2001 ACJ 1 (SC), had elaborately dealt with the extent of liability of an insurance company towards the third party as per Section 95 (1) (b) of the Motor Vehicles Act, 1939, and on the question as to what are its rights in case of payment of an amount in excess of the limits of the liability under the insurance policy vis-a-vis the insured.

26. In the aforesaid case, the claimants had raised a claim for an amount of Rs. 2,00,000 as compensation on account of death of their predecessor-in-interest in a road accident on 6.7.1988 involving the offending motor vehicle an autorickshaw bearing registration No. KRN 1859. The insurer had contested the claim specifically stating therein that its liability was limited to Rs. 50,000 under the policy of insurance. The Claims Tribunal, however, had granted an award for an amount of Rs. 1,94,150 and had fastened the entire liability on the appellant insurance company. The insurance policy in that case was of a date prior to the coming into force of the new Motor Vehicles Act, 1988, on 1.7.1989.

27. Under the aforesaid insurance policy the limit of the insurance company's liability in respect of any one claim or series of claims arising out of one event was fixed at Rs. 50,000 only. However, the avoidance clause of the policy provided that 'nothing in the said policy or the endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96. But the insured shall pay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions'. Section II of the policy dealt with 'liability of third party' and provided that the company will indemnify the insured against all sums including claimants' costs and expenses

which the insured becomes legally liable to pay in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or damage to the property caused by such use.

28. Taking into consideration the earlier decisions of the Apex Court in the case of *New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani*, 1958-65 ACJ 559 (SC) and *Amrit Lal Sood v. Kaushalya Devi Thapar*, 1998 ACJ 531 (SC), the Hon'ble Supreme Court came to the conclusion that despite holding the liability under the policy limited to the extent of Rs. 50,000, the Claims Tribunal and the High Court were not justified in directing the appellant insurance company to pay the whole of the awarded amount to the claimants on the basis of the contractual obligations contained in clauses relating to the liability of the third parties and avoidance clause. However, it was further indicated that the Claims Tribunal and the High Court were not justified in rejecting the right of the appellant insurance company to recover from the insured the excess amount paid in execution and discharge of the award of the Tribunal.

29. In the aforesaid view of the matter, the Apex Court allowed the appeal holding that the appellant insurance company was liable to pay the entire award amount to the claimants. Upon making such payment, the appellant can recover the excess amount from the insured by executing the award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988.

30. In its another decision in the case of *New India Assurance Co. Ltd. v. Kamla*, 2001 ACJ 843 (SC), the Supreme Court had indicated taking into consideration the implications arising under Sub-section (4) and its proviso together with Sub-section (5) of Section 149 of the Motor Vehicles Act, 1988, that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This, it was clarified means that the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

31. In para 22 of the aforesaid decision, the Apex Court summarised the position in law indicating that when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

32. In para 25 of the aforesaid decision, it was indicated that the insurer and the insured are bound by the conditions enumerated in the policy and the insurer was not liable to the insured if there was violation of any policy condition. But the insurer who was made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid licence.

33. In view of the aforesaid position in law and what has been indicated herein before, the appeal is allowed in part holding that the appellant insurance company is liable to pay the entire award amount to the claimants and upon making such payment, the appellant company can recover the excess (Sic.) amount from the insured by executing the award against the insured to the extent of such excess as per Section 174 of the Motor Vehicles Act, 1988. The impugned award shall stand modified to that extent. In other respects, since the owner has submitted to the impugned award, it shall remain intact.

34. There shall, however, be no order as to costs.