

Dayal Singh Vs. Janki Devi and ors.

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Court : Uttaranchal

Decided On : Dec-02-2005

Reported in : III(2006)ACC171

Judge : B.S. Verma, J.

Appellant : Dayal Singh

Respondent : Janki Devi and ors.

Judgement :

B.S. Verma, J.

1. This appeal has been preferred under Section 173 of Motor Vehicles Act, 1988 (in short the Act) against the judgment and award, dated 5.9.1998 passed by Motor Accident Claims Tribunal/District Judge, Chamoli (in short the Tribunal) in M.A.C. Petition No. 1 of 1994, Smt. Janki Devi v. Dayal Singh and Ors. whereby the learned Tribunal has awarded compensation of Rs. 1,00,000 in favour of the claimant as against the owner and driver of the Bus No. UP-07/0838 along with interest @ 10% per annum. The claim petition against the Insurance Company was dismissed.

2. Relevant facts of the case are that Sunil Kumar, aged 16 years, a student, son of the claimant, lost his life in a motor vehicle accident on 11.7.1993 at about 9-30 a.m. involving Bus No. UP 07-0838 which was being driven rashly and negligently

by its driver. According to the claimant on the fateful day, Sunil Kumar was going on foot to Karanprayag market from his home. When he reached near the bend at Uma Devi temple, he was hit by the bus with the result that Sunil Kumar fell down on the road and the bus itself turned over the boy causing his instantaneous death. The bus was being driven by the cleaner and not the driver. The deceased was a student of Class X. Longevity of the family of the deceased was stated to be more than 70 years. The claimant has claimed total compensation of Rs. 1,75,000 on different counts for the death of the deceased son.

3. O.P No. 1, owner of the bus, contested the claim petition and filed his written statement. It was asserted that a boy died due to the accident but his name and parentage were not known. It was also stated that the said bus reached Karanprayag at about 9 a.m. and at the relevant time, the bus was going to the workshop after crossing the bridge at Karanprayag. As soon as the bus reached near the bend at Uma Devi temple, two boys started doing up-down crossing the road. In the third attempt, a boy named Sunil Kumar took a jump from the upward side and in the process, he was confronted with the iron weighing machine installed on hilly side of the road and was hung therewith. Seeing this the driver of the bus lost control over the vehicle and the bus overturned but it had no concern with the deceased. According to him, the deceased died of his own due to hanging with the balance. It was denied that Dinesh Chandra was driving the bus at the relevant time and it was asserted that the bus was being driven by driver Mahabir Singh and the police wrongly implicated Dinesh Chandra, who was wrongly impleaded in the present case. It was also stated that the bus was duly insured, therefore, the liability for compensation, if any, lay upon the Insurance Company.

4. The O.P. No. 2 Dinesh Chandra also filed his separate written statement and he took the same stand as was taken in the written statement filed by the O.P No. 1, owner of bus in question. He has stated that he was the conductor in the bus and he was not driving it. He pleaded that in the accident he sustained injuries due to overturning of the bus and became unconscious. He was taken to Government Hospital, Karanprayag for treatment. He also pleaded that he was made accused by the police by mistake. He also stated that he did not know about the

whereabouts of the driver after the accident.

5. The Insurance Company contested the petition by filing its written statement. It has denied the allegations made in the claim petition. It has further pleaded that the claimant has not filed any documentary evidence in support of her case. The claimant and the owner have not furnished the details of insurance policy, cover note, etc. therefore the insurer does not accept the claim for compensation. It was also asserted that the insurer reserves its right to take further defence on the basis of necessary facts if disclosed during the pendency of the case by the claimant or owner.

6. On the pleadings of the parties, the learned Tribunal framed as many as five issues in the case. Issue No. 1 related to the rash and negligent driving by the driver of the offending bus resulting into death of Sunil Kumar. Issue No. 2 related to the negligence on the part of the deceased. Issue No. 3 related to the driving of the bus by the conductor or otherwise. Issue No. 4 related to mechanical failure of the bus and Issue No. 5 related to the relief and compensation.

7. The claimant in support of her case has filed the High School certificate of the deceased, certified copy of the High School mark-sheet of the deceased, certified copy of the post mortem report of the deceased, certified copy of the charge-sheet filed against accused Dinesh Chandra in Crime No. 72/93, under Sections 279, 304A, 337 and 427, IPC in the Court of the Munsif Magistrate, Karanprayag and certified copy of the FIR of the accident lodged by S.V Soti. Claimant also filed the notice sent by the owner to the claimant as paper No. 54-C. Owner of the vehicle has filed photostat copy of the certificate of the insurance as well as that of driving licence. In oral evidence, the claimant Janaki Devi has examined herself as P.W. 1 and Anil Purohit as P.W.2. The opposite parties have examined owner of the bus as D.W. 1 Dayal Singh and Dinesh Chandra as D.W. 2.

8. The learned Tribunal after hearing both the parties' Counsel took up Issue Nos. 1, 2 and 3 together for decision. The Tribunal has held that deceased Sunil Kumar died in the accident due to the sole rash and negligence on the part of the O.P. No. 2 Dinesh Chandra, the conductor who was driving the bus at the relevant time and there was negligence on the part of the deceased. Issue No. 4 relating to

mechanical failure of the bus was decided in the negative observing that Issue No. 4 was framed due to inadvertence. On Issue No. 5, the Tribunal came to the conclusion that the claimant is entitled to compensation of Rs. 1,00,000. The Tribunal fixed vicarious liability on the owner as well as O.P. No. 2 Dinesh Chandra, the conductor of the bus. The Insurance Company was absolved from the liability to pay compensation. Accordingly, the claim petition was allowed for compensation of Rs. 1,00,000 as mentioned earlier.

9. In support of appeal, it was contended that the impugned judgment and award is against the settled principles of law. It was submitted that the bus was given for driving to a licensed driver and it was proved on record that the bus was driven by another person without the authority of the driver, therefore, the Insurance Company cannot escape its statutory liability to pay compensation under Subsection (1) of Section 96. It was also submitted that the Insurance Company has not proved that the owner wilfully violated the conditions of the Policy. It was also contended that the Insurance Company neither pleaded nor led evidence that Dinesh Chandra, the conductor of the offending bus, was not having valid driving licence.

10. I have heard learned Counsel for both the parties and have carefully gone through the entire material on record including the lower Court record.

11. The short question for determination in this appeal is whether it was proved that the owner of the bus-appellant had allowed the bus to be driven by any person otherwise than a duly licensed person or whether the insured-appellant is guilty of negligence or failed to exercise reasonable care in fulfilling the condition of the policy regarding use of vehicle by duly licensed driver.

12. From a bare perusal of the claim petition, it is evident that the claimant has taken a positive case that the offending bus was being driven by one Dinesh Chandra, O.P. No. 2, who was conductor of the offending bus at the relevant time and he was not authorised to drive the same or say he was not duly licensed person to drive the bus. These facts have been mentioned in para No. 23 of the claim petition. At the outset, it may be noted that the Insurance Company has not at all pleaded anywhere in its written statement that the said Dinesh Chandra was

not having a valid driving licence. It has not led any evidence on this score before the Tribunal. It is true that the owner of the bus has denied in his written statement that the bus was being driven by aforesaid Dinesh Chandra, O.P. No. 2. Owner of the bus Dayal Singh, appellant, has examined himself as D.W.1 before the Tribunal. He has substantiated the contention raised in his written statement in his examination-in-chief. The appellant was cross-examined by the learned Counsel for the claimant at length. The Tribunal has put a specific question to D.W. 1 at page No. 5 of his evidence. In reply to the question, the owner has clearly stated that he had given stern directions to his driver not to hand over the key of the bus to the conductor or any other person. No suggestion was made from the side of the claimant to the effect that the conductor Dinesh Chandra was not having a valid driving licence. The owner D.W. 1 was also cross-examined on behalf of the Insurance Company. But no such suggestion was put to him. D.W. 2 Dinesh Chandra was examined by the appellant-owner. He was cross-examined on behalf of the Insurance Company. A suggestion was given to him that at the time of accident, Mahabir Singh, driver, and he himself were not having valid driving licence. D.W. 2 has clearly denied the suggestion by stating that it is wrong to say that Mahabir Singh and he were not having such a licence. I have carefully gone through the evidence on record. Even if it may be taken that Dinesh Chandra was driving the bus in question at the relevant time, it is not established on record from the side of the Insurance Company as well as claimant that said Dinesh Chandra was not having a valid driving licence. In this appeal, the finding of the Tribunal on the point of negligence has not been challenged. The evidence on record produced by the appellant before the Tribunal clearly shows that the owner of the bus-appellant had authorised his duly licensed driver Mahabir Singh to drive the bus himself. Insurance Company has, as mentioned earlier, neither pleaded nor led any evidence that Mahabir Singh was not having a valid driving licence.

13. It has been submitted on behalf of the Insurance Company that under Section 96(2)(b) of the Motor Vehicles Act, 1939 which corresponds to Section 149 of the Act, the Insurance Company is entitled to defend the case on the ground that there has been breach of a specified condition to the policy i.e. the vehicle should not be driven by a person who is not duly licensed. Learned Counsel for the appellant on the other hand placed reliance in the case of *Sohan Lal Passi v. P.*

Sesh Reddy and Ors. MANU/SC/0662/1996 : AIR 1996 SC2627 , and submitted that the instant case is squarely covered by the Apex Court judgment aforesaid. The appellant before the Apex Court was the owner of the bus, which had been insured by respondent No. 3, the Oriental Fire and General Insurance Company Limited. In that case the Apex Court examined the point as to whether the Insurance Company can be absolved of its liability to pay the compensation in a case where the owner of the vehicle had got the vehicle insured, but the accident took place when it was being driven by a person not holding the driving licence. The Apex Court considered the provisions of Sub-section (2)(b)(ii) of Section 96 of 1939 Act and held as follows:

Section 96(2)(ii) should not be interpreted in a technical manner. While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. The bar under Section 96(2)(b)(ii) on the face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. The expression 'breach' occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the Insurance Company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was wilful. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of Sub-section (1) of Section 96 of the Act. If the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the Insurance Company cannot repudiate its statutory liability under Sub-section (1) of Section 96. In the present case far from establishing that it was the insured-appellant who had allowed the cleaner/conductor of the bus to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating

the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he had engaged a licensed driver and had placed the vehicle in his charge. Therefore, the defence under Section 96(2)(b)(ii) is not available to the insurer.

14. Ultimately, the Apex Court allowed the appeal and modified the orders of the Claims Tribunal and the High Court and the Insurance Company was held liable to pay the compensation jointly and severally. The facts of the case before the Apex Court are similar to that of the instant case. In the present case, the offending bus was duly insured with the New India Assurance Company Limited. The owner-appellant had engaged Mahabir Singh as driver of the bus, who was having a valid driving licence. According to the claimant, the bus was not being driven by an authorised driver at the time of accident. It is not the case that the insured-appellant has allowed the vehicle to be driven by Dinesh Chandra, D.W. 2, who was conductor of the offending bus. It was also not established by the insurance Company that Dinesh Chandra, D.W. 2 the conductor of the bus, was not having a valid driving licence. The record shows that it was not within the knowledge of the owner-appellant that the driver engaged by him allowed the bus to be driven by the conductor. The Insurance Company has not at all established that the owner of the bus-appellant wilfully violated the condition of the policy. Moreover, in the case of *National Insurance Company Ltd. v. Swaran Singh* MANU/SC/0021/2004 : AIR 2004 SC1531 , in Para 110(iii), the Apex Court has observed as under:

Mere absence, fake or invalid driving licence or disqualification of the driver at the relevant time are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence or failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

15. For the reasons and discussion aforesaid, it is held that the Insurance Company is jointly and severally liable to pay the compensation and the appeal

deserves to be allowed and the impugned award dated 5.9.1998 is liable to be modified accordingly.

16. The appeal is hereby allowed and the impugned award is modified. It is held that the opposite parties Nos. 1 and 2 and the Insurance Company O.P. No. 3 shall be jointly and severally liable to pay the compensation as awarded by the Tribunal to the claimant. There shall be no order as to costs.

17. The amount in deposit with this Court, if any, be transmitted to the Motor Accident Claims Tribunal concerned for being paid to the claimant.

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