

Ashok Kumar Vs. Surinder Kumar and ors.

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Court : Himachal Pradesh

Decided On : Sep-04-1998

Reported in : 1999ACJ1119

Judge : D. Raju, C.J. and Kamlesh Sharma, J.

Appeal No. : F.A.O. (MVA) No. 332 of 1992

Appellant : Ashok Kumar

Respondent : Surinder Kumar and ors.

Advocate for Def. : Devyani Sharma, Adv.

Advocate for Pet/Ap. : Deepak Gupta, Adv.

Disposition : Appeal allowed

Judgement :

Kamlesh Sharma, J.

1. This appeal at the instance of claimant is against the award dated 19.6.1992, passed by Motor Accidents Claims Tribunal (I), Solan, whereby his claim petition was dismissed holding that the accident in question had taken place as a result of vis major and was not as a result of rash and negligent driving on the part of the driver of the vehicle. The claimant has now challenged these findings and prayed

for award of . 3,00,000 as compensation along with interest at the rate of 18 per cent per annum from the date of institution of the claim petition till the date of payment.

2. The brief facts of the case are that the claimant, who was working as a peon with the Registrar, Cooperative Societies, Punjab at Chandigarh, was travelling from Shimla to Chandigarh in a Matador bearing registration No. GDR 833 on 9.12.1989 which met with an accident at about 4 kilometres from Solan as a result of which the claimant sustained multiple injuries, including fracture of his left leg. The said Matador was owned by respondent No. 1 and driven by respondent No. 2 and was insured with respondent No. 3. The cause of accident, as given in the claim petition was that the driver 'lost the control of the vehicle due to fast speed and struck against a tree which was on the extreme left side of the road'. It is further stated that accident had taken place because of rash and negligent driving of the driver of the vehicle. In the reply filed on behalf of respondent Nos. 1 and 2, these allegations are denied and it is stated that 'the vehicle was being driven in a normal speed and while turning a very sharp curve the steering of the vehicle has jammed and it could not be controlled and the vehicle had come out of control on account of mechanical defect which could not be detected by the respondent No. 1'. However, the accident and the injuries received by the claimant as a consequence thereof have not been denied. On the other hand, respondent No. 3 has denied the accident as well as injuries to the claimant for want of knowledge. It has also denied its liability on the ground that the driver was not possessing valid driving licence. It is also averred that as per the terms of the insurance policy its liability is limited to Rs. 15,000.

3. On the pleadings of the parties, the following issues were framed:

(1) Whether the petitioner sustained injuries as a result of accident due to rash and negligent driving of respondent No. 2, an employee of respondent No. 1?

OPP

(2) To what amount of compensation, if any, is the petitioner entitled and from whom?

OPP

(3) Whether liability of the insurance company, respondent No. 3 is limited as alleged?

OPR

(4) Relief.

To prove his case, the claimant has himself appeared as PW 1 and has produced Dr. Vijay Goni, PW 2, Junior Resident, Department of Orthopaedics at P.G.I., Chandigarh, Om Parkash, PW 3, Moharar Head Constable, Police Station Solan. Respondent Nos. 1 and 2 failed to produce their evidence despite opportunities granted to them, therefore, their evidence was closed by the order of the court. So far as respondent No. 3 is concerned, it only tendered insurance policy Exh. RX and closed its evidence. The Motor Accidents Claims Tribunal has given the findings on issue No. 1 against the claimant holding that the accident was as a result of vis major relying upon the following admission of the claimant:

It is correct that the accident has taken place as the steering wheel of the vehicle had jammed.

In view of the findings on issue No. 1 the claimant was held not entitled to any compensation and issue No. 2 was decided against him. As a consequence of findings on issue Nos. 1 and 2, issue No. 3 was held redundant and the claim petition was rejected.

4. We have heard learned Counsel for the parties and gone through the record. We find substance in the submission made by learned Counsel for the appellant that jamming of steering wheel of the vehicle is a mechanical defect which cannot be termed as vis major. Quoting from Words and Phrases, Permanent Edition, Volume 44, Page 518:

A loss vis major is one that results immediately from a natural cause without intervention of men, and could not have been prevented by exercise of prudence, diligence and care; and in the civil law, the term is sometimes used as

synonymous with 'act of God' ...

AND

A loss is said to have been caused by vis major when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence and care and the use of those appliances which the situation of the party renders it reasonable that he should employ. Story defines vis major to be any irresistible natural cause, which cannot be guarded against by the ordinary exertions of human skill and prudence; and this definition is approved by Chief Justice Cockburn in *Nugent v. Smith*, 1 CP Viv 423, 437.

Therefore, the findings of Motor Accidents Claims Tribunal that accident was result of vis major are set aside.

5. In fact, respondent Nos. 1 and 2 in their reply had taken the defence that the accident had taken place as a result of mechanical defect of jamming of steering wheel of the vehicle which could not be detected by respondent No. 1 but they have not given any evidence to prove it. From the zimny orders dated 25.5.1992 and 16.6.1992, it is not clear that despite opportunities granted to respondent Nos. 1 and 2 they did not produce any evidence in support of their defence. By now it is well settled that burden of proving that the accident occurred due to mechanical defect is on the owner of the vehicle who should also prove that the said mechanical defect being latent could not be detected despite all reasonable care. Long back the Supreme Court of India in its judgment in *Minu B. Mehta v. Balkrishna Ramchandra Nayan*, 1977 ACJ 118 (SC), referring to the judgment of the House of Lords in *Henderson v. Henry E. Jenkins & Sons*, 1970 ACJ 198 (HL, England), in para 15 has held that 'the burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden'. It was also held that if such a plea is taken and proved, the owner is not liable for the accident which is caused due to a latent defect which is not discoverable by reasonable care [Also see: *Shakun v. State of Madhya Pradesh*, 1995 ACJ 64 (MP); *Oriental Insurance Co. Ltd. v. Renu Acharya*, 1996 ACJ 746 (HP) and *Himachal Road Trans. Corpn. v. Durma Devi*, 1997 ACJ 498 (HP)].

6. Since the respondent Nos. 1 and 2 have failed to prove that the mechanical defect of jamming of steering of the vehicle in question was a latent defect which they could not discover despite their taking care, they cannot be absolved of their responsibility that accident had taken place due to their negligence as had they taken reasonable care they would have detected the mechanical defect which led to jamming of the steering. Therefore, we have no hesitation to hold that accident had taken place due to the negligence of respondent Nos. 1 and 2 and the findings of Motor Accidents Claims Tribunal are set aside that accident had taken place due to vis major. Since the respondents have not come forward to defend this appeal despite due service on them, we have permitted Mrs. Devyani Sharma, appearing for the respondent No. 3, insurance company, to address us on the point-whether the accident was caused due to the negligence of respondent Nos. 1 and 2, who have made an abortive attempt to show that neither there were pleadings nor proof of negligence of respondents in the absence of which the claim petition has rightly been rejected by learned Motor Accidents Claims Tribunal. In para 24 of the claim petition, it is specifically averred that 'the accident took place due to the rash and negligent driving of the driver of the Matador, viz., Vijay Kumar, respondent No. 2. The injured claimant was not at all at fault.' In his statement before the Motor Accidents Claims Tribunal, the appellant has specifically stated that 'the accident had occurred due to the negligence of the driver respondent No. 2'. No doubt, in his cross-examination on behalf of respondent Nos. 1 and 2 he had admitted that cause of accident was jamming of steering of the vehicle, yet it was for respondent Nos. 1 and 2 to prove that jamming of steering was caused due to latent mechanical defect which could not be detected even by reasonable care of the vehicle taken by them which onus they have failed to discharge. In view of this, Mrs. Devyani Sharma, learned Counsel, is not right in submitting that the appellant has failed to prove issue No. 1 that he had suffered injuries as a result of accident caused by the negligence of the respondents.

7. Now the question is, to what amount of compensation the appellant is entitled. In his statement, the appellant has admitted that at the time of accident he was working as permanent peon in the Office of Registrar, Cooperative Societies of the State of Punjab and he had got reimbursement of his medical bills of Rs. 5,000 for

treatment of the injuries suffered by him in the accident. From his statement and the statement of Dr. Vijay Goni, PW 2, it is proved that as a result of accident the appellant had suffered fracture of shaft femur for which he remained admitted in P.G.I., Chandigarh from 9.12.1989 to 30.12.1989 during which period surgery was conducted on him. It is also proved that after discharge from P.G.I., Chandigarh, the appellant had continued getting treatment in Orthopaedics O.P.D. up to 18.3.1991. The disability certificate Exh. PW-2/A has also been proved by Dr. Vijay Goni, PW 2, wherein it is certified that the appellant has suffered 45 per cent disability in relation to left (not legible). In the opinion of this witness, 'There is a shortening of 1.5 cm. in the left lower limb and movement of left lower limb is restricted. The patient complained of pain in the left lower limb...Another surgery would be required to be performed to remove the plate...Due to the shortening the petitioner is not in a position to do heavy work. There would be limping.' This opinion of the doctor has not been shattered either in his cross-examination or by producing any counter evidence from which the pain and suffering undergone by the appellant after the accident and deprivation of enjoyment of normal living throughout his life can easily be imagined. The appellant has also stated that before accident he was also earning Rs. 1,200 p.m. approximately by participating in various cultural programmes of dance which used to be telecast from Jalandhar Doordarshan. In the absence of any evidence in support of this statement, we are not inclined to hold that the appellant had suffered any loss of income as a result of his inability to participate in various cultural activities of dance in which he might be taking part earlier to the accident but we have no hesitation to hold that as a result of the disability suffered by the appellant he is not able to participate in the cultural activities of dance, etc.

8. Therefore, in the totality of evidence on record, we hold that the appellant is not entitled to any compensation for pecuniary loss but he is definitely entitled to compensation for non-pecuniary loss, i.e., for pain and suffering and loss of enjoyment of leading normal life, having suffered shortening of 1.5 cm. in the left lower limb and restricted movements thereof as a result of which, besides limping, he will not be able to do heavy work. For both these counts the compensation of global sum of Rs. 50,000 will be just and reasonable. Accordingly, we award the amount of Rs. 50,000 as compensation to the appellant the payment whereof will

be made by respondent No. 3 along with 12 per cent interest from the date of institution of the claim petition, i.e., 30.3.1990 to the date of payment as there is no dispute that the vehicle in question was duly insured with respondent No. 3 at the time of accident and under the insurance policy its liability was unlimited. We need not refer to number of judgments cited by learned Counsel for the parties to show what should be the quantum of compensation as it depends upon the evidence in each case in respect of the pecuniary and non-pecuniary loss suffered by the claimant(s).

9. In the result, the appeal is allowed and the impugned award dated 19.6.1992, passed by Motor Accidents Claims Tribunal (I), Solan, is set aside and the claim petition of the appellant is allowed in the terms stated hereinabove.

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