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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.3429 of 2017(O&M)
Date of decision: 27.09.2022

Oriental Insurance Company Limited

..... Appellant

versus

Rakesh Kumar and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE TRIBHUVAN DAHIYA

Present: Mr. Ashish Yadav, Advocate for the appellant.

Mr. Ram Kumar Saini, Advocate for respondents No.2 to 4.

Mr. Manu Sachdeva, Advocate for Mr. Abhimanyu Singh, Advocate for respondent No.6.

TRIBHUVAN DAHIYA J.

This appeal has been filed by the Insurance Company against the award dated 11.01.2017, passed by the Motor Accident Claims Tribunal, Ambala, disputing its liability to pay the compensation awarded.

2. The facts in brief are, on 31.07.2015, Nisha (since deceased) along with her minor son/respondent No.4, who was going on foot, was hit by the offending vehicle/Bolero Jeep bearing registration No.HR-99-UH-TP-1013 driven by respondent No.1. Nisha died on the spot, and the minor suffered injuries. The Tribunal held respondent No.1 was driving the offending vehicle in a rash and negligent manner, resulting in death of

Nisha. Compensation amounting to Rs.12,55,000/- along with interest was awarded to respondents No.1 to 4/claimants, payable by the appellant and respondents No.5 and 6 (driver and owner of the offending vehicle), jointly and severally.

3. Firstly, learned counsel for the appellant has argued that the Tribunal has wrongly held respondent No.5/driver of the offending vehicle negligent on the basis of statement of eye-witness, Raman Kumar (PW-3). Testimony of this witness is not to be believed, since in the criminal trial, pertaining to the accident in question and arising out of FIR No.239, dated 31.07.2015, under Sections 304, 337 and 114 of IPC, at Police Station Ambala Cantt, this eye-witness appeared as PW-11 before the Judicial Magistrate, First Class, and denied the accident as well as involvement of the offending vehicle in the accident. He has, therefore, contradicted himself and deposed falsely. His testimony has been wrongly relied upon by the Tribunal to return the finding of negligence of respondent No.5/driver on issue No.1. Secondly, it has further been argued by learned counsel for the appellant that the licence (Exhibit R-4), said to have been issued on 18.08.2009 to respondent No.5/driver by the Licencing Authority, Bulandshahar, UP, was a fake licence. It has been proved by examination of Rakesh, Licencing clerk as RW-2 that the licence (Exhibit R-4) was never issued, and that it was a fake document.

4. *Per contra*, learned counsel for the respondents have argued that respondent No.5/driver has been rightly held negligent by the Tribunal on the basis of statement of the eye-witness. Respondent No.5/driver had a genuine driving licence issued on 11.01.2016, valid upto 15.11.2017 (Exhibit R-12).

5. Learned counsel for the parties have been heard and record perused.

6. The Tribunal while returning finding of negligence against respondent No.5/driver of the offending vehicle, has referred to statement of the eye-witness, Raman Kumar as PW-3, who was himself injured in the accident. FIR (Exhibit P-2) was lodged on the statement of this witness. Pursuant thereto, driver of the offending vehicle faced criminal trial in case titled *State vs. Shahrukh Khan* under Sections 304, 337 and 114 of IPC. Copy of the Post Mortem report of deceased Nisha is on record as Exhibit P-1. The Tribunal also recorded that respondent No.5/driver along with one Danish were acquitted of all the charges by the learned Additional Sessions Judge, Ambala, vide judgment dated 19.10.2016 (Exhibit R-6). It is also a matter of record that driver of the offending vehicle/respondent No.5 did not enter the witness box to controvert the statement of eye-witness, Raman Kumar (PW-3). On the basis of this evidence, the Tribunal held that the accident in question occurred on account of rash and negligent driving of the offending vehicle by respondent No.5/driver.

7. A perusal of the statement of eye-witness, Raman Kumar/ PW-3 before the Tribunal establishes that the factum of acquittal of respondent No.5/driver in criminal trial, vide judgment dated 19.10.2016, was not put to him. He was not confronted with the contradictory testimony, said to have given by him in the criminal trial, and deprived of the opportunity to explain as to why the said statement was made. Therefore, no adverse inference can be drawn against the eye-witness. There is no other evidence or material on record to doubt the testimony of this eye-witness. Consequently, the finding of negligence recorded by the

Tribunal on issue No.1 cannot be impeached, since it is based upon preponderance of probabilities.

8. Reliance placed by learned counsel for the appellant on a judgment of this Court in ***United India Insurance Company Limited vs. Kamla Devi and others***, **2010 (4) PLR 235** to discard the testimony of the eye-witness, is misplaced. In that case, the eye-witness was confronted with his contradictory statement before the criminal Court, and on account of no satisfactory explanation having been given by the said witness, it was held that the statement was not worthy of acceptance. Such a situation does not arise in the instant case as the eye-witness (PW-3) was not confronted with his testimony in criminal trial.

9. Further, law on this aspect has been settled by the Supreme Court in ***Sunita and others vs. Rajasthan State Road Transport Corporation and another***, **(2020) 13 SCC 486**, that in a motor accident claim case, once the foundational fact, i.e., the actual occurrence of the accident has been established, the Tribunal's role after that would be to calculate the quantum of just compensation if accident had taken place due to negligence of the driver. While deciding the cases, the standard of proof to be borne in mind must be of 'preponderance of probability'. The relevant part of para No.25 of the judgment reads as under:

> 25. ….. It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor

vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal case.

10. The second contention of learned counsel for the appellant regarding licence of respondent No.5/driver being fake, also deserves rejection in view of findings recorded on the issue. The Tribunal while returning finding on issue No.3, "*whether respondent No.1 was not having a valid and effective driving licence on the date of accident, if so, its effect? OPR 3*", held the driver was having a valid driving licence (Exhibit R-10). Reliance has been placed on the statement of respondent No.6-owner of the offending vehicle (RW-1). He testified that only after due verification of validity of the licence, he employed the driver. The licence was issued by the District Transport Officer, Nagaland. Exhibit R-12 is 'No Objection Certificate' issued by the Authority in Nagaland that the licence (Exhibit R-10) was issued to respondent No.5 and was valid up to 15.11.2017. The existence of the other driving licence Exhibit R-4 (referred to by the appellant-Insurance company), was denied by the owner, RW-1. It has further been held by the Tribunal that the driving licence (Exhibit R-10) was issued by the District Transport Authority, Nagaland, on 05.11.2010 and was valid upto 15.11.2017, which permitted him to drive various kinds of vehicles including light motor vehicles and heavy motor vehicles. Therefore, respondent no.5 was held to be having a valid driving licence.

11. It has been held by the Supreme Court in *National Insurance Company Limited vs. Swaran Singh and others*, **2004 (2) RCR (Civil) 114**, that the defence regarding fake licence of the person driving the offending vehicle would be available to the Insurance Company. But despite the licence being fake, the default on the part of the owner has to be established before the Tribunal to avoid liability. Para No.105 (iii) & (iv) of the judgment reads as under:

> (iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving 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 insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.
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> (iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

12. In the instant case, there is no evidence on record to establish that the insured-respondent no.6 was guilty of any negligence or that he

failed to exercise reasonable care in employing the driver of the offending vehicle. Rather, the evidence has been led to the effect that insured-owner of the offending vehicle (RW-1) did take proper care before employing driver of the offending vehicle. He enquired about the validity of the licence from the Licencing Authority, Nagaland, and found it to be genuine. In these circumstances, the owner cannot be said to have defaulted on any of the conditions of the Insurance Policy nor can he be termed negligent. Therefore, the appellant-Insurance company cannot avoid its liability to indemnify the insured, and finding of the Tribunal on the issue does not suffer from any infirmity.

13. On account of the aforesaid analysis of facts and law, the appeal fails and is hereby dismissed. No costs.

(TRIBHUVAN DAHIYA)
JUDGE

27.09.2022
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Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No