S/L No.25
01.02.2023
Ct-237
(PA.RD)

FMA 3353 of 2013
With
CAN 2/2013 (Can 7056 of 2013)
With
CAN 5 of 2019 (CAN 12221 of 2019)
(Application not in the file)

National Insurance Co. Ltd.
Vs
Tilak Baraily & Anr.

Mr. Rajesh Singh, Advocate

... for the Appellant/ National Insurance Co. Ltd.

Ld. Advocate Mr. Rajesh Singh has appeared on behalf of the appellant Insurance Company. None appears on behalf of the respondents in spite of the repeated calls. Since this appeal is pending since 2013, I am inclined to dispose of this appeal on merit.

In an accident, claimed to have been occurred on 28.12.2008 at about 7.00 a.m. at Rishi Road, Below Hospital, Pedong under the Police Station, Kalimpong, wherein claimant Tilak Baraily sustained injury. It is specific case of the claimant/injured, according to column 23 of the claim petition, that the accident took place due to failure of **'break-system'.**

Accordingly instant claim petition was filed on

11.03.2010 before the Ld. Motor Accident Claim Tribunal, Kalimpong district Dargeeling with a prayer for compensation to the tune of Rs.5,00,000/- in terms of 25 years age of the claimant/ injured having income of Rs. 8,000/- per month from his profession i.e. driver of Motor vehicle. The said claim petition was registered as Motor Accident Claim Case No. 22 of 2010.

Owner contested the claim case by filing written statement contending, inter alia, that the vehicle (Bus) bearing Reg. No. WB-76/3949 was duly insured with the National Insurance Company Ltd. at the time of alleged accident. Tone and tenor of the written statement filed by the owner reflects only information as to insurance coverage.

National Insurance Company contested the claim petition by filing the written statement denying all material averments of the claim petition contending, inter alia, that the accident took place due to negligent on the part of the driver/claimant/ injured and therefore, Insurance company is not liable to pay any compensation whatsoever.

To prove the case claimant/ injured examined three witnesses including himself as PW-1, Dhruba Adhikari, claiming himself to be an eye witness to the accident, was examined as PW-2 and one

Doctor S.R. Pradhan was examined as PW-3 who issued the certificate showing 50% partial permanent disability. On the other hand owner of the bus Sri Narayan Pradhan examined himself as OPW-1, to produce documents in respect of vehicle in question. In course of their evidence FIR, reporting final form with prayer for discharging the driver and disability certificate were admitted in evidence.

Ld. Tribunal framed seven issues as follows:-

- Whether this case is maintainable in law and on fact?
- Whether the petitioner Tilak Baraily sustained injuries in the motor vehicle accident dated 28.12.2008?
- Whether the vehicle bearing Registration No. WB 76-3949 was involved in the alleged accident?
- Whether the alleged offending vehicle was duly insured with the O.P. No. 2 at the time of the accident?
- Whether the petitioner has suffered any permanent disablement?
- Whether the petitioner is entitled to get compensation as prayed for?
- To what are the reliefs, if any, petitioner is entitled?

After evaluation of evidence and documents on record Ld. Tribunal decided all issues in favour of the claimant and finally awarded compensation to the tune of Rs. 4,61,000/-.

Not satisfied with the judement of the Ld. Tribunal, OP/National Insurance Company preferred this appeal on the ground of no liability of the Insurance Company to pay compensation to the claimant.

Ld. Advocate, Mr. Rajesh Singh has submitted that Ld. Tribunal ignored requisite conditions of Section 166 of the Motor Vehicles Act wherein, a bounden duty casts upon the claimant to prove the rash and negligent driving of the vehicle. According to Mr. Singh there is no evidence on record discharging the liability of proof of rash and negligent driving. Mr. Singh has further contended that reason of alleged accident i.e. failure of break of the bus has not been substantiate by any evidence on behalf of the claimant. In support of his contention, he relied on case of ***Minu B. Mehata & others Vs Balkrishna Ramchandra Nayan & others*** reported in ***AIR 1977 SC 1248: (1977) 25 SCC441.***

To succeed in a claim case under Section 166 of the Motor Vehicles Act, 1988, claimants has to prove rash and negligent driving of the vehicles involved in the accident. In this case, I find that neither any issue was framed in this regard nor that was discussed by the Ld.

Tribunal. However, according to claim petition as well as evidence of the claimant (PW-1) it is found that accident happened due to failure of break of the bus and admittedly claimant was driver of that bus. It is needless to mention, that no effort was ever taken by the claimant to prove the alleged plea of failure of break of the bus let alone adducing any evidence of expert in this regard. Owner of the bus also examined himself as OPW-1 and only concentrated to shift the onus of liability by testifying insurance coverage of the bus at the relevant point of time.

In ***Minu B. Mehta*** (supra) larger bench of the Hon'ble Apex Court handed down the principles regarding proof of mechanical defects of vehicle in para 12 13 and 14 and also let down the principle of proof of negligent in para 26, 27 & 36:-

> " ***12. Mr. Nariman, the learned counsel appearing for the owners submitted that the High Court did not hear arguments on the question whether the accident took place due to rash and negligent driving of the lorry and therefore the ques- tion will have to be gone into by this Court or remanded for fresh disposal. We find that the High Court has given a clear finding in paragraph 30 of its judgment that the***

Tribunal rightly disbelieved the plea and held that it was the. driver who was negligent and that they fully concur with the reasons and findings of the learned Member of the Tribunal. In the face of the clear finding we are unable to accept the plea of the learned counsel that this question was not gone into by the High Court. We find ourselves in complete agreement with the finding of the Tribunal and the High Court that it was due to rash and negligent driving of the lorry that the car in which the applicant and Malati M. Deshmukh were travelling was hit causing injuries to both of them. We accept the testimony of the doctor and D.W. 4 Jawakar that the lorry crossed the road dividers, ran into the wrong side and hit the car which was driven by the applicant. We have no hesitation in accepting the concur- rent findings of the High Court and the Claims Tribunal that the accident was due to the rash and negligent driving of the lorry driver. We have also no hesitation in reject-

ing the testimony of the defence that there was some mechan- ical defect which resulted in the tie rod end breaking. We find ourselves in agreement with the reasoning of the Claims Tribunal that the evidence on the side of the owners is contradictory and the testimony of the expert destroys the plea of any mechanical defect set up by them. In this con- nection we may also point out that in order to succeed in a 9--206SCI/77 defence that the accident was due to a mechanical defect the owners will have to prove that they had taken all necessary precautions and kept the lorry in a roadworthy condition. No such attempt was made to establish that all necessary precautions were taken-to keep the lorry in a roadworthy condition and that the defect occurred in spite of the reasonable care and caution taken by the owners.

13. In order to sustain a plea that the accident was due to the mechanical defect the owners must raise a plea

that the defect was latent and not discoverable by the use of reason- able care. The owner is not liable if the accident is due to a latent defect which is not discoverable by reasonable care. The law on this subject has been laid down in Hen- derson v. Henry E. Jenkins & Sons.(1). In that case the lorry driver applied the brakes of the lorry on a steep hill but they failed to operate. As a result the lorry struck and killed a man who was emerging from a parked vehicle. The defence was that brake failure was due to a latent defect not discoverable by reasonable care on driver's part. It was found that the lorry was five years old and Minu B. Mehta And Another vs Balkrishna Ramchandra Nayan And ... on 28 January, 1977 Indian Kanoon - http://indiankanoon.org/doc/661219/ 7 had done at least 150,000 miles. The brakes were hydrauli- cally operated. It was also found after the accident that the brake failure was due to a steel pipe bursting from .7mm. to

.1mm. The corrosion had occurred where it could not be seen except by removing the pipe completely from the vehicle and this had never been done. Expert evidence showed' that it was not a normal precaution to do this if, as was the case, the visible parts of the pipe were not corroded. The corrosion was unusual and unexplained. An expert witness said it must have been due to chemical action of some kind such as exposure to salt from the roads in winter or on journeys near the sea. The House of Lords held that the burden of proof which lay on the defendants to show that they had taken all reasonable care had been dis- charged. The defect remained undiscovered despite due care As the evidence had shown that something unusual had hap- pened to cause this corrosion it was necessary for the defendants to show that they neither know nor ought to have known of any unusual occurrence to cause the breakdown. (See Bingham's Motor Claims Cases Seventh Ed., p. 219).

14. 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 de- spite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken-to keep the lorry in a road worthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent pleaded and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal.

26. This plea ignores the basic requirements of the owner's liability and the claimant's right to receive

compensation. The owner's liability arises out of his failure to discharge a duty cast on him by law. The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to. compensate any one else. The Claims Tribunal is a tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only common law and the law of torts. If under the law a person becomes legally liable then the person suffering the injuries is entitled to be compensated and the Tribunal is authorised to determine the amount of compensation which appears to be just. The plea that the Claims Tribunal is entitled to award compensa- tion which appears to be just when it is satisfied on proof of injury to a third party arising out of the use of a vehicle on a public place without proof of negligence if accepted would lead to

strange results.

27. Section 110(1) of the Act empowers the State Government to constitute, one or more Motor Accidents Claims Tribunals for such area as may be specified for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death or bodily injury to persons. The power is optional and the State Government may not constitute a Claims Tribunal for certain areas. When a claim includes a claim for compensation the claimant has an option to make his claim before the Civil Court. Regarding claims for compensation therefore in certain eases Civil Courts also have jurisdiction. If the contention put forward is accept- ed so far as the Civil Court is concerned it would have to determine the liability of the owner on the basis of common law or torts while the Claims Tribunal can award compensation without reference to common law or torts and without coming to the conclusion that the

owner is liable. The concept of owner's liability without any negligence is opposed to the basic principles of law. The mere fact that a party received an injury arising out of the use of a vehicle in a public place, cannot justify fastening liability on the owner. It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable. The proof of negligence remains the lynch pin to recover compensation. The various enactments have attempted to mitigate a possible injury to the claimant by providing for payment of the claims by insurance.

36. In a recent judgment of Madras High Court a Division Bench is A.A.O. Nos. 607 of 1973 and 296 of 1974 M/s. Ruby Insurance Co. Ltd. v. V. Govindaraj and others, delivered on 13th December, 1976, has suggested the necessity of having social insurance to provide cover for the claimants irrespective of proof of

negligence to a limited extent say Rs.250 to Rs. 300 a month. It has also suggested that instead of a lump sum payment which does not often reach the claimants a regular monthly payment to the dependants by the nationalised insurance company or bank would be Minu B. Mehta And Another vs Balkrishna Ramchandra Nayan And ... on 28 January, 1977 desira- ble. Unless these ideas are accepted by the legislature and embodied in appropriate enactments Courts are bound to administer and give effect to the law as it exists today. We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner of the insurance company could be held to be liable for the payment compensa- tion in a motor accident claim case."

Therefore, claimant of this case was duty bound to prove negligence on the part of the bus giving rise to the accident. Here in this case, no such evidence was adduced. On the other hand, plea of failure of break of the bus at the time of accident was not substantiate by any cogent evidence.

Considering all the aforesaid discussion, I am of the humble opinion that Insurance Company can not be held liable for payment of compensation.

With regard to plea of failure of break i.e. mechanical defect it is the duty of the owner to show that he had taken all reasonable care and despite such care the defect remained hidden. It is also the duty of the owner to keep the bus in a road worthy condition. But, in our case though owner contested the claim petition but failed to adduce any evidence to show his duty of taking care of the bus in a road worthy condition.

In this case it has been proved that claimant sustained injury in an accident by the involvement of bus bearing no. WB76-3949 and he suffered partial permanent disability to the extent of 50%. Therefore, I find hardy any scope to interfere with the quantum of award given by the Ld. Tribunal.

In the aforesaid view of the matter, I am of the view that owner of the bus liable to pay entire awarded compensation.

It appears from the record that Insurance Company deposited the entire awarded amount of Rs. 4,61,000/- before the office of the Ld. Registrar General on 31.07.2013 and 06.09.2013. It also appears from the record that the claimant withdrew 50% of the deposited awarded amount by the order of the Court.

Claimant/injured is at liberty to withdraw the balance amount of Rs. 2,30,500/- along with all accrued interest from the office of the Ld. Registrar General.

Ld. Registrar General is requested to the disburse amount to the claimant on proper identification.

Appellant/Insurance Company is at liberty to recover the entire awarded sum with interest from the owner of the bus bearing Reg. No. WB 76-3949 (respondent no. 2) through execution proceeding in terms of the observation of the Hon'ble Apex Court in ***Oriental Insurance Co. Ltd. V. Nanjappan & Ors. Reported in AIR 2004 SC 1630 : (2004) 13 SCC 244***.

With aforesaid observation this appeal stand disposed of.

All pending application, if there be any, stand disposed of.

A copy of the Tribunal Record order along with a copy of this order be transmitted back immediately.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Bibhas Ranjan De)