(2008) 08 DEL CK 0159

Delhi High Court

Case No: MAC APP No. 118 of 2006

Seema Arya		APPELLANT
	Vs	
Smt. Sudha Devi and Others		RESPONDENT

Date of Decision: Aug. 4, 2008

Acts Referred:

- Evidence Act, 1872 - Section 102
- Motor Vehicles Act, 1988 - Section 146, 147, 147(1), 147(2)

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: Pradeep Gupta, for the Appellant; Vijay Prakash, for the Respondent

Final Decision: Allowed

Judgement

Kailash Gambhir, J.
The present appeal arises out of the order dated 14/10/2005 of the Motor Accident Claims Tribunal, Delhi.

2. The facts of the case in nutshell for the proper appreciation of the matter are as follows:

On 10.3.2003 the deceased late Sh. Satya Deo Singh after loading embroidery material from M/s H.S. Embroidery, B-43, sector-57, Noida in Vikram Tempo bearing registration No. HR 38H 4598 was travelling in the said tempo as caretaker of the material/goods, which were to be transported to the factory of his employer at Kundli, Sonepat, Haryana at about 10:30pm. When the said tempo reached near Mukhmailpur, traffic signal on the GTK Road an accident occurred and the deceased fell down on the road and sustained fatal injuries.

Sh. Pradeep Gupta, counsel for the appellant contended that the learned tribunal committed an error in concluding that the deceased was neither an owner nor a care-taker of the goods when in fact there was sufficient material on record to prove

that the deceased was travelling in the vehicle as a caretaker of the goods loaded from H.S. Embroidery, B-43, Sector-57, Noida and were being taken to the factory of the owner at Kundli, Sonipat, Haryana. The counsel also submitted that the Insurance company did not lead any evidence whatsoever to demolish the case of the claimants that the deceased was travelling as a caretaker of the goods in the tempo, therefore, it was urged by the counsel that the tribunal erred in concluding that the deceased was neither owner nor a care taker of the goods. The counsel also urged that the learned tribunal failed to appreciate that Sh. Karam Singh, driver nowhere stated in the FIR that the deceased was not the caretaker of the goods in question, rather he had specifically mentioned that the goods were loaded by the deceased from the factory of H.S. Embroidery, Noida for the purpose of transporting the same to its own factory at Kundli, Sonipat, Haryana, therefore, the tribunal wrongly treated the deceased as a gratuitous passenger. The counsel averred that as per the insurance policy, the insurance company is obligated to honour all the statutory obligations arising under the Motor Vehicles Act. The counsel contended that since the deceased was sitting as a caretaker for transporting the goods from Noida to Kundli, then in terms of the provisions of Section 147 of the MV Act, the insurance company was duty bound to honour 100% liability/award amount as awarded by the tribunal to the extent of Rs. 4.25 lacs as the liability of the insurance company was unlimited and even if the liability of the insurer is raised up to Rs. 7,50,000/- then also the insurer alone would be liable. The counsel further submitted that the tribunal erred in not noticing that the appellant is a lady belonging to a poor family and is herself trying to adjust in Delhi by taking all sorts of strains and is not in a position to take financial liabilities, to satisfy the impugned award. The counsel submitted that the impugned order is liable to be set aside on the ground of violation of the principles of natural justice as ex-parte proceedings were initiated against the appellant without service of any notice on the appellant. The counsel further urged that the summons were served on the appellant as a witness on behalf of the insurance company for giving her statement and throughout she was never informed by the court that she was also a contesting party to the claim proceedings. The counsel further submitted that the appellant gave the statement in verbatim as was told to her by the insurance company without knowing that even she could be held liable to pay the compensation amount. It was contended by the counsel that she was made to understand by the insurance company that for the liability to fall on them, they required her statement. The counsel for the appellant has relied on the judgment entitled National Insurance Co. Ltd. Vs. Baljit Kaur and Others, , in support of his contentions.

3. Per Contra, Sh. Vijay Prakash, counsel for respondent No. 7 refuted the submissions of counsel for the appellant. The counsel averred that the appellant petitioner has wrongly interpreted the provisions of law as would be evident from paras 14 & 17 of the judgment of the Hon''ble Apex Court entitled National Insurance Co. Ltd. Vs. Baljit Kaur and Others, . The counsel further explained that

the contention of the appellant that the deceased was sitting as a caretaker for transporting the goods from Noida to Kundli is baseless and the Court cannot loose sight of the fact that the appellant initially did not plead before the learned tribunal that the deceased was employed with M/s H.M. Mehra & Co. and was travelling in the offending vehicle as a caretaker. The counsel avowed that the appellant improved her statement by making amendment in her claim petition before the learned tribunal with a view to bring the matter within the scope of the expression ''authorized representative of owner of goods''. The counsel urged that the tribunal has correctly fastened the liability on the appellant owner and her driver instead of fastening the same on the insurance company. The counsel also contended that the findings of the tribunal are reasoned and based on the pleadings and proofs and on the statement of Sh. Karam Singh, driver wherein he stated that Sh. Satya Dev Singh was travelling in the offending vehicle along with his father Sh. Surinder Singh as a gratuitous passenger .The counsel urged that the tribunal has rightly exempted the respondent No. 7 insurance company from its liability for the reasons that there was breach of terms of the insurance policy.

4. In rejoinder, the counsel for the appellant has traversed the contentions of the counsel for respondent No. 7. The counsel urged that the claimant Smt. Sudha, respondent No. 1 herein, in her statement as well as in her cross-examination and the driver Sh. Karam Singh in FIR clearly stated that the deceased was an employee of M/s H.M. Mehra & Co. The counsel further relied on the employment certificate dated 14/4/2003 placed on record issued by the employer M/s H.M. Mehra & Co. wherein it has been certified by the employer that the deceased was an employee of M/s H.M. Mehra & Co.

5. I have heard learned Counsel for the parties and perused the record.

6. Perusal of the record shows that the present appellant who is the owner of the offending vehicle did not choose to contest the case and was proceeded ex-parte. The wife of the deceased Smt. Sudha who entered the witness box as PW-3 failed to produce any record to prove the employment of the deceased Satya Dev with M/s. H.M. Mehra & Co. The fact which was pleaded in the petition filed by the claimant respondent about the employment of the deceased with M/s. H.M. Mehra was thus not proved by the claimant respondent in the evidence. In this backdrop, the moot question which arises in the present case is, whose duty it was to prove as a matter of act that the deceased was the care-taker of the goods being loaded on the tempo. Both the counsel for the parties have placed reliance on the judgment of the Apex Court in National Insurance Co.Ltd. v. Baljit Kaur and Ors. (2004) 2 SCC. In the said case the Apex Court has discussed the scope of Section 147 of the Motor Vehicles Act after its amendment by the Motor Vehicles (Amendment Act) 1994. After the amendment the clear position which emerges is that the words ''any person'', occurring in Section 147 would also cover persons who were travelling in goods carriage not in any capacity whatsoever but if they were travelling in the capacity of

an owner of the goods or its authorised representative. Relevant para of the said judgment is referred as under:

17. By reason of the 1994 amendment what was added is "including owner of the goods or his authorised representative carried in the vehicle". The liability of the owner of the vehicle to insure it compulsorily, thus, by reason of the aforementioned amendment included only the owner of the goods or his authorised representative carried in the vehicle besides the third parties. The intention of Parliament, therefore, could not have been that the words "any person" occurring in Section 147 would cover all persons who were travelling in a goods carriage in any capacity whatsoever. If such was the intention, there was no necessity of Parliament to carry out an amendment inasmuch as the expression "any person" contained in Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 would have included the owner of the goods or his authorised representative besides the passengers who are gratuitous or otherwise.

18. The observations made in this connection by the Court in Asha Rani case to which one of us, Sinha, J., was a party, however, bear repetition:

26. In view of the changes in the relevant provisions in the 1988 Act vis-�-vis the 1939 Act, we are of the opinion that the meaning of the words ''any person'' must also be attributed having regard to the context in which they have been used i.e. ''a third party''. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

19. In Asha Rani it has been noticed that Sub-clause (i) of Clause (b) of Sub-section (1) of Section 147 of the 1988 Act speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place. Furthermore, an owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers travelling in the vehicle. The premium in view of the 1994 amendment would only cover a third party as also the owner of the goods or his authorised representative and not any passenger carried in a goods vehicle whether for hire or reward or otherwise.

20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit

of insurance to such category of people.

7. Thus, after the aforesaid discussion there remains no doubt that the insurer is liable to compensate in a case where owner of the goods or its authorized representative die or receive bodily injury. u/s 146 of the Motor Vehicles Act, 1988, no vehicle can be plied on the road without taking out an insurance against third party risk. Section 147(1)(b)(i) provides that in order to comply with the requirements of Chapter XI of the Act, a policy of insurance must be a policy which insures for death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place.

8. Section 147(1)(b) of the Motor Vehicles Act, with which we are concerned, reads as under:

147. Requirements of policies and limits of liability:

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(b) insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen''s Compensation Act, 1923(8 of 1923) in respect of the death of, or bodily injury to, any such employee -

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be

deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

9. On perusal of the aforesaid legal provision and in the facts of the instant case, it is manifest that to prove breach of insurance policy, the insurance company will have to prove that the deceased was not owner of the goods or his authorised representative/caretaker of the goods. To prove that the deceased was not a caretaker of the goods, it was duty of the insurer to summon owner of the goods. But, The insurer of the offending vehicle i.e., respondent No. 7 has not chosen to summon the employer of the deceased so as to prove the fact that the deceased was not a caretaker or authorised representative of the owners of the goods but was merely a gratuitous passenger. Similarly, the owner of the offending vehicle i.e., appellant herein has also not chosen to contest the case but came to enter the witness box at the instance of the insurance company to prove the fact that the deceased was not in her own employment which deposition was immaterial in view of the provision of Section 147(2)(b).

10. On perusal of the impugned award it becomes manifest that the learned tribunal relied upon the FIR, Ex. PW2/A, which was registered on the statement of the driver Sh. Karam Singh, wherein he specifically mentioned that the deceased was travelling along with his younger son in the said vehicle who was having no relation with the owner of the vehicle or the goods in the vehicle. But statements in the FIR are not corroborative evidence to prove that the deceased was a gratuitous passenger as the insurer and owner were to prove that the deceased was not an authorized representative or care-taker of the goods.

11. The Motor Vehicles Act indisputably is in the nature of a social welfare legislation. The Act is enacted with the object of providing monetary assistance to the victims of the road accident and the family of such victims.

12. While holding the appellant owner of the vehicle liable to compensate the claimants, the tribunal also relied on the testimony of the appellant. Although, the appellant owner of the vehicle after appearing in the witness box stated that the deceased was not in her employment but that is immaterial in the light of the foregoing discussion. But we cannot loose sight of the fact that it is no more res integra that the burden to prove that the deceased was a gratuitous passenger was on the insurance company. When the insurance company pleads breach of policy then, in view of the provision of Section 102 of the Evidence Act, the onus is on the insurance company to prove that the policy has been breached.

13. In this regard in Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others, , the Hon''ble Apex Court observed as under:

The insurance company complains of breach of a term of contract which would permit it to disown its liability under the contract of insurance. If a breach of a term of contract permits a party to the contract to not to perform the contract, the burden is squarely on that party which complains of breach to prove that the breach has been committed by the other party to the contract. The test in such a situation would be who would fail if no evidence is led.

14. In view of the above discussion, I am of the view that since the insurance company failed to prove the breach of policy and also that the deceased was a gratuitous passenger, therefore, for the same the appellant owner cannot be made to suffer. Directions are accordingly given to the insurance company to compensate the claimants in terms of the impugned award.

15. With these directions, the present appeal is allowed. The respondent No. 7 insurance company shall pay the amount awarded by the Tribunal with upto date interest. The amount, if any, already paid by the appellant shall be reimbursed by the respondent No. 7 with interest @ 7% per annum from the date of payment made by the appellant till payment made by respondent No. 7 insurance company to the appellant.

16. With these directions the appeal is disposed of.