Allahabad High Court
United India Insurance Co. Ltd. vs Smt. Rashida Khatoon And Ors. on 27 September, 2004
Equivalent citations: 2006 ACJ 1461, 2006 (1) AWC 471
Bench: P Kant, R Sharma
JUDGMENT Pradeep Kant and Rajiv Sharma, JJ.

1. This first appeal from order arises out of an award passed under the Motor Vehicles Act, 1988, passed by the Motor Accident Claims Tribunal.

2. The brief facts which gave rise to the filing of the claim petition are that one Ayaz Ahmad, who was driver of Mini Truck bearing No. U. P. 32 A/8306 while driving the same, met with an accident with the truck No. HR-38-6369. The accident occurred on Lucknow-Gorakhpur road when the deceased was coming from Basti to Gorakhpur and the offending vehicle was going from Lucknow to Gorakhpur. The time of accident is 7.30 a.m. The date of accident 24th January, 2000. According to the claimants' case, the driver of the truck, namely, the offending vehicle was driving rashly, negligently and at a very high speed and, therefore, it lost the balance and hit the mini truck of deceased Ayaz Ahmad who was driving the vehicle cautiously and with moderate speed. Further case was that the truck driver after hitting the mini truck ran away damaging the truck heavily, as a result of which accident, Ayaz Ahmad died.

3. Written statements were filed by the parties.

4. The insurance company filed written statement separately saying that the accident might have occurred because of own negligence of the deceased. M/s. Sanghi Traders, who were contractor/owner of the offending Vehicle also filed written statement. In the written statement filed by the Insurance Company, a plea was taken that the accident might have occurred because of own negligent driving of the driver of the mini truck and that the truck was not being driven by a person, who was having a valid driving licence. The Insurance company in essence pleaded that the accident had taken place because of the composite negligence of drivers of both the vehicles and also vaguely pleaded that they were not being driven by the drivers having valid driving licence. The owner of the Truck though denied the accident but qualified with the defence that in case accident was found to have been occurred because of the negligence of the driver, the liability would have to be met by the insurance company as the truck was duly insured.

5. Five issues were framed in the case.

6. The first issue was regarding the rash and negligent driving of the driver of the truck, which resulted into death of Ayaz Ahmad. The second issue was with respect to the fact as to whether the truck was insured at the time of accident. Third issue related to the contributory negligence of Ayaz Ahmad in the accident. Fourth issue related to the validity of the driving licence and the fifth issue was regarding the amount of compensation to be awarded.

7. Issues No. 1 and 3 were decided together. Rashida Khatoon was examined as P.W. 1. She is widow of the deceased Ayaz Ahmad, who was not an eye-witness. Pawan Kumar, who was cleaner of the

mini truck, was an eye-witness. He deposed that on 24.1.2000 he was accompanying the driver and when the truck reached nearby barrier in front of forest department office, Truck bearing No. HR/38-6369 came with a very high speed and the same was being driven rashly and negligently, which hit his mini truck, namely, vehicle No. U. P./32-8306, damaging it badly and also injuring the driver. The driver Ayaz Ahmad was immediately taken to hospital by him where he was declared dead. He also stated that Ayaz Ahmad was an experienced and a perfect driver and he never met with any accident throughout his career and he was not at fault in any manner for causing accident. The entire fault was put upon the driver of the truck bearing number HR/38-6369. An F.I.R. was also lodged by him. In his statement, he gave the speed of the offending vehicle above 80 km. per hour and that of the truck, which the deceased was driving, as 40 km. per hour.

8. In the cross-examination, P.W. 2 Pawan Kumar stated as under :

Basti se subha 6.45 par Lucknow ke liye chale thhe. Lagbhag paanch Kilometer chale thhe. Ghatna Amne Samne Hui. Meri Tata ka baye side ka hissa zyada damage hua. Phir kaha meri gadi ka dahina hissa damage hua. Saamne wali gaadi ka baaya hissa damage hua. Saamne waali gaadi takkar maarkar nikalti chali gayi. Us gaadi ka number maine dekh liya thha

9. Apart from the evidence of P.W. 1 and P.W. 2 and filing of the F.I.R. and the charge-sheet, which was framed against the driver of the offending vehicle, no evidence was led either by the owner of the truck or by the insurance company.

10. It may be taken note of, that the insurance company did have the permission under Section 170 of the Motor Vehicles Act to adduce the evidence, which otherwise was available to the owner of the vehicle only. The insurance company despite opportunity did not file any document or its own evidence and the owner also did not furnish any evidence except copy of the driving licence of the deceased Ayaz Ahmad.

11. The Tribunal recorded a finding on issues No. 1 and 3 that the accident caused because of the rash and negligent driving of the driver of the offending vehicle, namely, truck No. HR/38-6369 and that there was no iota of evidence to establish that the deceased was negligent in driving the vehicle.

12. On issue No. 2, the factum of vehicle being insured was accepted.

13. In issue No. 4, the fact regarding the driving licence of the driver of truck No. HR-38/3969 was considered and it has been held that simply because the driving licence was not filed by the owner of the truck, it would not give rise to an adverse inference for holding that the driving licence was not valid. In arriving this conclusion, the Tribunal has held that in the case of Narcinva, 1985 ACJ 397, the Apex Court has held that if in such situation where the person driving the vehicle was not shown to be having no driving licence, the insurance company is legally bound to have got the evidence produced to substantiate the allegations and that in the case of , it has been held that that mere non-production of licence or non-examination of the driver of the vehicle is not enough nor any adverse inference can be drawn against a person for holding that because of non-examination of the driver or non-production of the licence, the burden is discharged by mere question in

cross-examination nor the owner is under any obligation to furnish the evidence so as to enable the insurance company to wipe put its liability under the contract of insurance. So far, the validity of the driving licence of the driver of offending vehicle is concerned, this question, on the basis of the evidence on record, has been decided against the insurance company.

14. Learned counsel for the appellant has placed reliance upon the case of Brij Pal Singh v. Brij Pal Singh and Anr. 2003 All LJ 873, wherein it has been held that insurance company is liable only when it is proved that driver of offending vehicle had valid driving licence and, therefore, the burden to prove that the driver had a valid licence is upon the owner of vehicle and not upon the insurance company.

15. Even if that is so, the Apex Court has held that the ground that the driving licence was not valid would not be a defence for the insurance company for not making the payment under the award, though right has been given to the insurance company to realise the amount from the owner by initiating appropriate proceedings against the owner on establishing the aforesaid fact.

16. On issue number 5, an amount of Rs. 4,57,500 has been awarded in all. The age of the deceased has been taken between 35 to 40 years with a monthly income of Rs. 3,500 and after deducting 1/3rd amount from the same, as the expenses which might have been spent by the deceased on his own, had he been alive, the amount has been multiplied by applying a multiplier of 16. Apart from the aforesaid compensation, certain amount towards funeral expenses, loss of consortium and loss of estate has also been awarded.

17. Learned Counsel for the appellant Sri R.C. Sharma has urged that from the evidence on record, it is clear that that the accident took place between the two vehicles and both the vehicles were involved in the accident and the evidence on record establishes beyond doubt that the accident was as a result of composite negligence of both the drivers and, therefore, the Tribunal ought to have apportioned the amount of compensation between the insurance company and the owner of the vehicle, which the deceased was driving.

18. He has also challenged the finding on the validity of the driving licence and quantum of compensation on the ground that there was no evidence on record to take the age of the deceased in the bracket of 35 to 40 years nor there was any evidence regarding the income of the deceased as Rs. 3,500 per month.

19. So far the question of composite negligence of two drivers is concerned, we find that neither the owner of the offending vehicle nor the insurance company did lead any evidence. The finding of rash and negligent driving and fastening the entire liability upon the owner of the truck is based on the evidence led by the claimants themselves. It is cardinal principle of law that the claimants have to establish and prove their own case and of course in a matter of accident under the Motor Vehicles Act, the defendants/ respondents also have an equal right to establish their case by placing such evidence, as may be necessary. Statement of P.W. 1, namely, Smt. Rasheeda Khatoon, does not throw any light upon the manner, in which the accident had taken place and the Tribunal has rightly not considered her, a witness of accident. Her statement with respect to the age of deceased and that

of his income has been taken into account by the trial court. P.W. 2, namely, Pawan Kumar, the cleaner of the mini truck, who incidentally was also eye-witness, has been examined by the claimants and solely on whose statement findings have been recorded against the offending vehicle.

20. The Tribunal has observed that the witness has stated that the truck was running at a very high speed of 80 km/h and this corroborates the F.I.R. where he stated that the truck was coming at a very high speed. He also stated about the place, time and date of the accident The Tribunal has also observed that in the cross-examination, he (Pawan Kumar) deposed that he was an employee as cleaner of the truck and the opposite party No. 1 (M/s. Sanghi Traders) was the owner/contractor of the offending truck and the offending truck was damaged on the right side but the truck fled away after hitting his mini truck.

21. Learned Counsel for the appellant has rightly argued that the manner in which the accident has been shown and the damage which has been caused to the two vehicles apparently establishes that the accident could not have taken place unless there was a contributory negligence on the part of both the drivers. He further says that statement of fact regarding the statement of witness Pawan Kumar is not true depiction of the statement, which he has given in the case.

22. We, therefore, have gone through the record and also the statement given by Pawan Kumar, P.W. 2. The correct statement given by Pawan Kumar has been referred by us in the earlier part of the judgment, which gives strength to the argument advanced by the learned Counsel for the appellant. Pawan Kumar has not stated anywhere that the truck of respondent No. 4 was damaged on the right side. He has stated that left portion of his truck was damaged and then he said that right portion was damaged and that the left portion of truck No. HR/38-6369 was damaged and after hitting his truck, the offending truck fled away. In case damage was on the left side of both the vehicles and the truck driver after hitting the truck on left side fled away, it cannot be presumed that right side of the truck was also damaged. Even assuming that it was an accident where there could have been fog in the morning as it was about 7.30 a.m. in the month of January, the accident can occur only if both the drivers had not taken precaution and care.

23. From the statement of P.W. 2, it is not clear that in what manner the accident had taken place in such a way that after hitting the mini truck on the left side and also damage being caused to the left side of the offending truck then in what manner, the right portion of the mini truck was also damaged when the offending truck fled away according to the own statement of P.W. 2. The damage on the left side of both the vehicles coming from opposite direction leave no room of doubt that the accident occurred because of the contributory negligence of both the drivers. Since mini truck as well as the offending truck both were hit on their left side, at the first instance, it raises a strong presumption that both the vehicles were on their wrong side.

24. In the case of Karnataka State Road Transport Corporation v. K.V. Sakeena and Ors. , in the accident four deceased and two injured were passengers in a bus owned by the Karnataka State Road Transport Corporation, namely, the appellant in the said case, when it was involved in an accident at 10.30 p.m. on 6.5.1987 on Bangalore-Mysore road. The accident occurred when the bus hit a truck trailer coming from the opposite direction. Upon the trailer was mounted a rear dumper.

Subsequent to the collision, the bus moved 150 feet, collided with a tree on the left of the road and turned turtle. The bus driver was amongst those who died. The Tribunal came to the conclusion that it was the bus driver alone who was negligent and rejected the contention that there was any negligence on the part of the driver of the truck. Before the Supreme Court it was not in dispute that the driver of the bus was negligent, but it was canvassed on behalf of the Corporation that the driver of the truck had by his negligence contributed to the accident and that the liability to pay compensation was joint and several and should be apportioned in accordance with the degree of their respective negligence. The Apex Court found that the owner, driver and insurer of the truck trailer could not be spared and they were liable, jointly and severally, to pay 40 per cent of the compensation.

25. In the case of Smt. Indrani Raja Durai and Ors. v. Madras Motors and General Insurance Co. and Ors. 1996 (2) TAC 77 (SC), the Apex Court after recording the following findings regarding apportionment of negligence, held that the driver of the bus equally contributed to the accident and apportioned the negligence as 60% and 40%.

We have scanned the evidence and reasoning of the High Court and the Tribunal. Unfortunately, the High Court has not considered the evidence from the proper perspective. Since the driver of the bus equally was driving at high speed, greater care was required of him to see that no accident took place. It would appear from the circumstances that the deceased, with a view to save himself from being sandwiched between the car and the bus, had taken to the extreme right. As a consequence, he hit the left bumper of the bus. It would thus be clear that the driver of the bus equally contributed to the accident. On the facts and circumstances, we think that negligence can be apportioned as 60% and 40%. As a consequence, the respondent is liable to pay compensation of Rs. 60,000 and Rs. 40,000 would be foregone by the appellants.

26. We, therefore, find that on the basis of the evidence of P.W. 2, the fact of accident stands proved, negligence of the driver of the offending vehicle in the accident also stands proved but at the same time his own statement was sufficient to hold that there was compulsory negligence of the driver of the mini truck also. That being so, we are of the view that liability has to be shared either by the owner of the mini truck or the same has to be relinquished by the claimants as they have chosen not to implead the owner of the mini truck as a party.

27. For determining the amount of compensation, the evidence has been led regarding the age, by Rasheeda Khatoon, wife of the deceased, which has not been controverted. In the post mortem report, the age of the deceased was stated as 42 years. The age of wife was found to be 30 years who has two small children of 5 years and 3 years. Under these circumstances, if the Tribunal put the age of the deceased in the bracket of 35 to 40 years, it cannot be said that some arbitrariness has been done in considering the age of the deceased.

28. With respect to the amount of compensation, no evidence was led by the respondents either against the age of the deceased or against his income. In view of the statement of fact made by the wife of the deceased regarding his income, we also feel that the deceased, being driver of the truck, has rightly been held to be having an income of Rs. 3,500 per month. The Tribunal has deducted an

amount to the extent of l/3rd from annual income of the deceased towards his own expenses. The multiplier of 16 has rightly been applied in calculating the compensation.

29. We do not find any illegality in the aforesaid amount being awarded, but as a result of our findings with respect to composite negligence of drivers of both the vehicles, are of the view that liability of compensation should be apportioned to the extent of 75% and 25%. Insurance company shall pay 75% of the total amount of compensation, whereas the rest 25% amount shall not be realised by the claimants from the insurance company. However, it will be open for the claimants to initiate appropriate proceedings against the owner, if they so desire for realising the said amount.

30. The F.A.F.O. is partly allowed. No order as to costs.