Serial No. 22

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Case:- MA No. 143/2018

The New India Assurance Co. Ltd. …..Appellant(s)/Petitioner(s)

Through: Mr. Rupinder Singh, Advocate
Ms. Damini Singh Chouhan, Advocate.

Vs

1. Safder Ali …… Respondent(s)
2. Shammen Ahmed Wani
3. Ali Hussain

Through: Mr. Ajay Singh Kotwal, Advocate for R-1.

Coram: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE

ORDER
(17.10.2023)

1. In the instant appeal filed under section 173 of the Motor Vehicles Act, 1988(for short, **'Act of 1988'**), challenge is thrown by the appellant to award dated 28.04.2018 (for short impugned award) passed by the Motor Accidents Claims Tribunal, Kishtwar ***(in short the Tribunal)*** in case titled as "Safder Ali Vs. New India Assurance Co. Ltd and others".

2. Facts emerging from the record would reveal that the respondent 1 herein filed a claim petition under section 166 of the Act of 1988 before the Tribunal for compensation for the grievous injuries sustained by him in a vehicular accident caused on 15.04.2013 while travelling in vehicle bearing No. JK06-3360, at Machipal, Thathri, District Kishtwar, due to rash and negligent driving of the driver of the said vehicle.

3. **Objections** to the claim petition came to be filed by the respondent 1/appellant herein stating therein that the offending vehicle was being driven by the driver/respondent 3 in violation of the provisions of the Motor Vehicles Act inasmuch as in contravention of the terms and conditions of the insurance policy and since the owner and driver of the vehicle being respondents 2 & 3 herein

had failed to comply with the provisions of the Act 1988, as such, sought indulgence of the Tribunal to defend the claim petition on all available grounds under section 170 of the Act 1988. It also came to be stated in the objections by the insurance company/appellant herein that the offending vehicle was overloaded and carrying more passengers than the seating capacity as authorized by the policy as also was being plied without any valid route permit at the time of relevant accident.

4. Upon the pleadings of the parties, the Tribunal framed following issues:

> (1) Whether on 15.04.2023 the injure Safder Ali S/o Rehmat Ullah Shah R/o Village Hallaran Tehsil Thathri District Doda received injuries in a Motor Vehicledue to rash and negligent driving of offending vehicle Tata Sumo bearing registration No. JK06-3360 driven by its driver i.e. respondent No. 3 owned by respondent No. 2 and insured with respondent No. 1 and became permanently disabled?
>
> (2) In case issued No. 1 is proved in affirmative, whether the Claimant is entitled to compensation, if so, to what amount and from whom?
>
> (3) Whether the driver of the offending vehicle was not holding valid and effective driving Licence at the time of accident?
>
> (4) Whether the vehicle in question was being driven in violation, if so, what is its effect?
>
> (5) Relief.

5. During the course of the adjudication of the claim petition, the claimant/respondent 1 herein besides appearing as his own witness also examined witnesses namely Imran Rahi, Mir Qasim and Dr. Anil Gupta, Senior Consultant Orthopedics.

6. On the contrary the respondents including the appellant herein did not produce any witness before the Tribunal and Tribunal after adjudicating the claim petition passed the impugned award holding the insurance company/appellant herein liable to satisfy the award owing to the fact that the offending vehicle was insured with it.

7. The impugned award in the memo of appeal is being questioned on the fundamental ground that the Tribunal did not appreciate the facts of the case, in particular, the claim petition filed by the claimant/respondent 1 herein, wherein a clear admission had been made that the claimant suffered injuries while travelling in the offending vehicle on account of a stone boulder having fallen on the vehicle in question clearly suggesting that the accident happened not on account of rash and negligent act of the driver of the offending vehicle but on account of unforeseen reasons being an Act of God (Vis Major) and as such, the Tribunal ought to have dismissed the claim petition.

It is also urged in the grounds that the Tribunal wrongly fastened the liability upon the insurance company/appellant herein without there being any pleading in the claim petition, on the basis of the evidence led by the claimant/respondent 1 herein **who had improved the narration of the facts of accident.**

It has also been urged in the grounds that the Tribunal failed to appreciate the distinction between the principle of *res ipsa loquitur* and Vis-Major wrongly and proceeded to allow the claim petition and pass the impugned award which otherwise is perverse in nature without having any sanctity of law.

It is lastly urged in the grounds that the amount of compensation awarded in terms of the impugned award by the Tribunal in favour of the claimant/respondent 1 herein is neither fair nor reasonable.

Heard learned counsel for the parties and perused the record.

8. It is pertinent to note here that the doctrine of *res ipsa loquitur* is that as a normal rule, it is for the plaintiff to prove negligence and for the defendant to disprove it, but under this exception the defendant is presumed to be negligent

when the defendant gives no explanation." The term "negligence" connotes breach of duty and is a term of art having distinct meaning in different jurisdictions/statutes. In torts, damage is an essential ingredient, however, that element is not necessary in law of master and servent. In crimes there is a series of offences based on negligence in which loss or injury is not material. Negligence has also been defined to be failure to observe for the protection of the interest of another person, the degree of care, precaution and vigilance which the circumstances justly demand whereby such other person suffers injury.

Adverting to the fundamental ground of challenge qua the Act of God (Vis Major) urged by the appellant it is profitable to note that in an action for negligence, the defence which are available to a party besides others is also Act of God (Vis Major) suggesting a direct, violent, sudden and irresistible act of nature as could not, by any amount of human foresight be resisted. Thus, these are the acts which are occasioned by the elementary forces of the nature un-connected with an agency of man.

It is urged by the insurance company/appellant herein that there has been an admission in the pleadings/claim petition filed by the claimant/respondent 1 herein that he the claimant suffered injuries while travelling in the offending vehicle on account of falling of a stone boulder on the vehicle and in presence of such an admission, the evidence led by the claimant/respondent 1 herein improving his case in order to prove negligence on the part of the driver of the offending vehicle could not have been entertained and relied upon by the Tribunal.

It is profitable note that, in law, pleadings and proof are distinct and different from each other and in a claim petition filed under the provisions of Motor Vehicles Act, the strict rules of pleadings are not applicable suggesting that it is not imperative and necessary for a claimant to plead specifically all the facts in the claim petition.

Record reveals that the claimant/respondent 1 herein had specifically pleaded that he suffered serious injuries while travelling in the offending vehicle

which got hit by a stone boulder on account of rash and negligent driving of the driver. The said specific pleadings of the claimant got corroborated by him while appearing as his own witness in the witness box as also by the evidence of his other witnesses who in one voice have deposed that the driver of the offending vehicle though was persuaded by them not to ply the vehicle on account of stone shooting in the area, yet, the driver rashly and negligently drove the offending vehicle and in the process got hit by a stone boulder resulting into the injuries sustained by the claimant/respondent 1 herein.

Ironically, the insurance company/appellant herein while setting up the defence of Act of God (Vis Major), though not specifically pleaded in the pleadings before the Tribunal, yet admitted in their objections before the Tribunal that the offending vehicle was being driven by the driver in violation of the provisions of Motor Vehicles Act as also in contravention of the terms and conditions and limitations to the use of the vehicle prescribed in the policy of insurance and the Act of 1998 and even if it is assumed for the sake of arguments that the insurance company/appellant herein did not plead the negligence of the driver of the offending vehicle, yet law is settled that such a plea that the accident had not taken place due to rash and negligent driving of the driver could only be taken either by the owner of the vehicle or by the driver of the vehicle and not by the Insurance Company.

Thus in view of aforesaid position the defence of Act of God (Vis Major) is not available to the Insurance Company/appellant as no such defence was either pleaded nor any evidence led in this behalf by the Insurance Company/appellant herein before the Tribunal.

9. Further perusal of the record of the Tribunal *ex facie* tends to show that the claimant/respondent 1 herein proved the issues onus whereof was put on him not only proving the fact that he suffered bodily disability on account of the vehicular accident caused by the vehicle in question driven rashly and negligently by the driver but also that he, as such, is entitled to the compensation which compensation seemingly has been assessed and worked out by the Tribunal not only having regard to the facts and circumstances of the case, the

evidence on record but also to the principles and parameters laid and evolved in this behalf by the courts of law and as such in presence of such facts and circumstances the rest of the grounds urged by the appellant Insurance Company against the impugned award pale into insignificance more so in view of the law laid down by the Apex Court passed in case titled as **"*Anita Sharma and others Vs. New India Assurance Co. Ltd. and another*"** reported in ***2021(1) JKJ(SC) 140*** would be relevant wherein at Para-22 following has been held:

> "22. Equally, we are concerned over the failure of the High Court to be cognizant of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable in MACT claim cases. The standard of proof in such like matters is one of preponderance of probabilities, rather than beyond reasonable doubt. One needs to be mindful that the approach and role of Courts while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eye-witnesses, as may happen in a criminal trial; but, instead should be only to analyze the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true."

10. Viewed thus, what has been observed, considered and analyzed hereinabove, the impugned award does not call for any interference. Resultantly appeals fails and, accordingly, is **dismissed**.

(JAVED IQBAL WANI)
JUDGE

JAMMU
17.10.2023
Shivalee

Whether the order is reportable : Yes