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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 27.11.2014

+ MAC.APP. 957/2011

TATA AIG GENERAL INSURANCE CO LTD Appellant
Through Mr.Manish Kaushik, Advocate for
Mr.K.L.Nandwani and Mr.Sameer
Nandwani, Advocates.

versus

ALPANA KHANDHWAY & ORS Respondents
Through Mr.Ashok Popli, Advocate for R-1 & 2.
Mr.Shoumik Mazumdar, Advocate for
R-6.

+ MAC.APP. 1092/2011

ALPANA KANDHWAY & ANR Appellants
Through Mr.Ashok Popli, Advocate

versus

BAJRANJ BALI TRANSPORT CO & ORS Respondents
Through Mr.Shoumik Mazumdar, Advocate for
R-2.
Mr.Manish Kaushik, Advocate for
Mr.K.L.Nandwani and Mr.Sameer
Nandwani, Advocates for R-4.

+ MAC.APP. 991/2011

NATIONAL INSURANCE CO LTD Appellant
Through Mr.Shoumik Mazumdar, Advocate.

versus

ALPANA KHANDHWAY & ORS

..... Respondents

Through Mr.Ashok Popli, Advocate for R-1 & 2.
Mr.Manish Kaushik, Advocate for
Mr.K.L.Nandwani and Mr.Sameer
Nandwani, Advocates for R-4.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. The brief facts which led to filing of these three appeals are that Sh.Niranjan Kumar Khandhway was going in an Accent Car on the GT Road which was driven by its driver. At Shyam Garh Village ahead of District Karnal, Haryana, the car hit a stationary tanker which was said to be standing in the middle of the road. Due to the forceful impact, the front portion of the car got totally damaged. Both the occupants of the car i.e. the driver and Sh. Niranjan Kumar Khandhway died on the spot. Accordingly, the present claim petition was filed by the dependents, namely, the widow Alpana Khandhway, minor son and the father of the deceased who also expired during the pendency of the claim petition. MAC APP. 957/2011 is filed by the insurer of the Accent car. MAC. APP. 1092/2011 is filed by the claimants for enhancement of compensation. MAC APP. 991/2011 is filed by the insurer of the tanker.

2. I may note that in MAC. 991/2011 and 1052/2011 the appellants have not taken steps to serve the driver of the Accent Car. However, the driver of the Accent Car is served in MAC. APP. 957/2011. The three appeals are being heard together.

3. In view of the order I propose to pass the absence of the driver of the Accent Car is of no consequence. Even otherwise he is served in MAC. APP.

957/2011 but none has appeared for him.

4. I will first dispose of the two appeals filed by the insurance company, namely, MAC. 957/2011 and 991/2011.

5. Learned counsel appearing for TATA AIG General Insurance Co. Ltd. (hereinafter referred to as TATA) seeks to impugn the Award in MAC.APP.957/2011 whereby 50% of the liability has been fastened on the appellant Insurance Company i.e. TATA. Learned counsel makes two submissions to challenge the Award. He submits that the entire negligence was of the driver of the tanker as the tanker was standing in the middle of the road without any indication. Accordingly, there was no reason to hold that it is a case of composite negligence and to fasten liability of 50% on TATA Insurance Co. He next submits that the vehicle was being used as a taxi which is apparent according to him from the cross-examination of PW-1, the widow. He submits that in view thereof the appellant TATA Insurance Co. is not liable to pay any amount whatsoever.

6. Learned counsel appearing for the appellant in MAC APP. 991/2011 National Insurance Co. Ltd. makes only one submission i.e. that the evidence on record indicates that the Accent Car was being driven at a very fast speed and the accident has occurred due to the same. He challenges the findings of the Tribunal regarding composite negligence and submits that the accident occurred due to the sole negligence of the Accent Car and no liability can be put on the National Insurance Company Ltd.

7. A perusal of the award shows that the Tribunal had relied upon the evidence of Balbir Singh PW-2, an eye witness who has pointed out the sequence of events leading to the accident. He states that the milk tanker was

standing on the road without any indication of parking. It further noted that as per his evidence, the Accent Car driver could not control its vehicle and rammed the vehicle into the said tanker. The Tribunal concluded that in the absence of any clear evidence from the side of the appellants/National Insurance Company about the manner of the accident, the rash and negligent driving against the driver of the tanker cannot be ruled out as the tanker was standing stationary in the middle of road without any light or indication. The Tribunal further held that the deceased driver was also driving the Accent in a careless manner and had he kept a suitable distance sufficient to brake the speed, he would have noted the tanker was not moving. Accordingly, the Tribunal has relied upon the judgment of the Supreme Court in the case of ***A.P.S.R.S.T.C. & Anr. vs. K. Hemalatha and Ors., IV (2008) ACC 454 (AC)*** and held it to be a case of composite negligence and that there would be 50: 50 liability. The Tribunal of course concluded that keeping in view the facts that the vehicle was kept parked in the middle of the road by the driver and a major fault lies with the tanker and fastened 85% liability on the tanker and remaining 15% was to be shared by the Accent Car. Final directions however were issued asking both the Insurance Companies to pay 50% of the award amount.

8. To deal with the submissions of the Insurance Companies, I will first deal with the evidence on record. PW-2 Balbir Singh, an eye witness, in his evidence explains as follows:-

“I am the eye witness of the accident occurred on 26.10.05 at Tarawadi, Shamgarh Just away 10 KM from Karnal towards Ambala Side on GT road between one Accent Car of silver colour car and milk tanker when I was coming from the side of Ambala towards Delhi. On the GT road on accent car bearing registration No. DL 8C 1658 was going just ahead of our Accent

car at the distance of 50/60 feet. At that time on GT road one milk tanker was parked without given any indication of parking so, the accent car immediately applied its break but the driver could not control his vehicle and said vehicle pushed into the said milk tanker from its behind after collided. We also applied the break and tried to cut my vehicle on kacha road.”

9. In his cross-examination he says as follows:-

“The speed of the accidental accent car was around 80 KMPH. My accent car was also running on the same speed. I was driving my accent car. I saw the milk tanker from my running car at the distance of 200 feet. The tanker was parked in between the road which goes towards Delhi from Ambala. It is wrong to say that I came to the court being eye witness at the instance of family members of deceased Niranjana Kr. as he was known to me prior to the accident. It is further wrong to say that I have not seen the accident with my own eyes. It is wrong to say that the accident took place due to negligence driving of the accidental accent car.”

10. The Supreme Court in the judgment of *A.P.S.R.S.T.C. & Anr. vs. K. Hemalatha and Ors.(supra)* has in para 10 held as follows:-

“10. ‘Composite negligence’ refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured

which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.”

11. In the light of the clear un-rebutted evidence of PW-2, in my opinion, it is clear that the facts show it to be a case of composite negligence. The tanker was standing in the middle of the road without any indication. There is every possibility that a vehicle howsoever careful it may be may not be able to judge the vehicle standing in the middle of the road and may cause an accident. On the other hand, it is also on record that the Accent car was being driven by its driver at a very fast speed. Accordingly, I see no reason to differ with the findings recorded by the Tribunal holding that the accident took place on account of composite negligence of the drivers of the two vehicles.

12. On the issue of sharing of the liability by the two insurance companies, in view of the judgment of the Supreme Court in the case of ***A.P.S.R.S.T.C. & Anr. vs. K. Hemalatha and Ors.(supra)*** as quoted above, I see no reason to interfere with the said directions in the award.

13. Coming now to the issue as to whether the vehicle in question was being used a taxi, PW-1 in her cross-examination makes one stray statement that the car in which her husband was travelling at the time of the accident was hired by her husband. Except this stray statement there is nothing on record to show that the car was hired for any consideration. R4W1Sh. Sanjeev Bhardwaj, Assistant Manager, TATA Insurance Company repeats that the vehicle in question was being plied for hire and reward as per the said deposition of PW-1. Admittedly, the widow did not hire any taxi. She would not be aware about

the full factual details. She was not an eye witness to the transaction of hiring. There is no evidence on record to show that if any consideration was paid or if so how much consideration was paid. It is not possible to conclude about the vehicle having being hired as a taxi on a mere stray statement made in cross-examination by the widow PW-1. There is accordingly, in my opinion, no reason to differ with the view expressed by the Tribunal. There is no cogent evidence on record to conclude that the Accent Car was being used as a taxi. There is no merit in both the appeals of the insurance companies i.e. MAC. APP. 957/2011 and 991/2011 and the same are dismissed.

14. I will now deal with the appeal filed by the claimants i.e. MAC APP.1092/2011. The Tribunal awarded a total compensation of Rs.53,86,432/- as follows:-

1. Towards Loss of Dependency	Rs.53,46,432/-
2. Towards loss of estate & Consortium	Rs.25,000/-
3. Towards funeral and other expenses	Rs.15,000/-
Total	Rs.53,86,432/-

15. Learned counsel for the claimants submits that the Tribunal has wrongly computed the income of the deceased. He points out that the Tribunal has based on the income tax return for the year 2004-2005 which shows an income of Rs. 3,14,497/- concluded that the income would be Rs.26,208/- per month. He submits that along with the income tax return a copy of the balance sheet was filed which shows a net profit as per the profit and loss account of Rs. 7,76,763/-. He submits that this was the correct income of the deceased which should have been the basis for assessing the income of the deceased. Hence, he

submits that the loss of dependency would be much higher. He further submits that the compensation awarded for non-pecuniary damages is inadequate.

16. I will first deal with the contention that the Tribunal has wrongly assessed the income of the deceased. The Tribunal noted that the copies of the income tax returns along with the profit and loss account, balance sheet and the income tax computation sheets for the years 2002-03, 2003-04, 2004-05 and 2005-06 and 2006-2007 are available on record. As per the document being the income tax return for the year 2004-05 which is before the death of the deceased, the net income is shown as Rs.3,14,497/-. This income has been accepted by the Tribunal and loss of dependency has been accordingly computed. The Tribunal after having assessed the income at Rs.26,208/- per month enhanced the same for future prospects to bring it to Rs.39,312/-. 1/3rd was deducted for personal expenses. As the deceased was 33 years old at the time of the accident, a multiplier of 17 was used. Hence a total loss of dependency of Rs.53,46,432/- was awarded.

17. PW-1, the claimant in her affidavit by way of evidence makes a bald averment that her husband was earning Rs. 10 lacs per annum and also exhibits his income tax returns. In her cross-examination she says as follows:-

“It is correct that the return for the assessment year 2004-05 is only for a sum of Rs.3,14,497/-. The tax of Rs.40,000/- was paid to income tax deptt. It is correct that the return for the year 2005-06 is only for a sum of Rs. 2,62,277/- and tax of Rs.49,047/- was paid to the income tax deptt. It is correct that the return for the year 2006-07 is only for a sum of Rs.1,15,920/- and tax of Rs.1624/- has been paid.”

18. Similarly PW-3 Chartered Accountant Sh. Prakash Kumar Dutta was also examined by the counsel. He states that he is the Chartered Accountant

who looks after the accounts of M/s. Shriram Steel (partnership Firm) of which the deceased was a partner and another firm Niranjani Hitech Ltd. He used to file company returns as well as individual returns of the partners. However, for some odd reasons there is no attempt on his part to show how much the deceased was earning.

19. Coming to the documents relied upon heavily by the learned counsel for the claimants i.e. the balance sheets. The said balance sheet for the ended 2003-2004 no doubt shows a net profit as per profit and loss account of Rs.7,76,763/- . However it is an unsigned document. There is one balance sheet for the year ending 31st March 2003. This appears to be a photocopy of something which has been signed by the deceased. It is not clear as to why no attempt was made to prove this balance sheet. The Chartered Accountant, PW-3 entered into the witness box. He was the right person to have deposed about the income of the deceased by proving these balance sheets as presumably he would have been the author of these balance sheets as he has said that he was filing the returns of the deceased. No such evidence is forthcoming.

20. PW-1 is completely silent and has only filed the copies of the income tax returns. It is hence not possible to accept the balancesheets.

21. Given the nature of evidence placed on record and the evidence of PW-1, in my opinion there are no reasons to differ with the findings recorded by the Tribunal assessing the income of the deceased based on the last income tax return filed prior to his death.

22. Coming to the compensation awarded for non-pecuniary damages, the Tribunal has awarded Rs. 25,000/- towards loss of estate & consortium, and Rs. 15,000/- for funeral and another expenses.

23. Keeping in view the judgments of the Supreme Court in the case of *Rajesh & Ors. vs. Rajbir Singh & Ors., (2013) 9 SCC 54 and Anjani Singh vs. Salauddin, JT 2014 (7) SC 183*, I enhance the compensation for loss of consortium, keeping in view the facts that the accident is of 2005, from Rs.25,000/- to Rs. 1 lac. Similarly, no amount has been paid for loss of love and affection for the minor child. I award a sum of Rs. 1 lac as loss of love and affection towards minor child.

24. Rs.15,000/- has been paid as funeral expenses. I may note that PW-1 in her affidavit by way of evidence has said that the body of her deceased husband was taken to Calcutta by Air from Delhi and from Calcutta it was taken by road to Girdiah where the funeral ceremony was performed. She states that she has spent Rs.50,000/- on transportation and funeral rites on social ceremonies, etc. In view of the peculiar facts and circumstances of this case, in view of the evidence of PW-1 which is unchallenged I accordingly award Rs.50,00/- for funeral expenses.

25. The total compensation would now payable comes to Rs.55,96,432/- as follows:-

1. Towards Loss of Dependency	Rs.53,46,432/-
2. Towards loss of estate & Consortium	Rs.1,00,000/-
3. Towards funeral and other expenses	Rs.50,000/-
4. Towards loss of love and affection	Rs.1,00,000/-
Total	Rs. 55,96,432/-

26. MAC APP. 1092/2011 stands disposed of.

27. As per interim order dated 01.11.2011 of this court in MAC. APP. 957/2011 the TATA Insurance Company was directed to deposit the award

amount. On 28.02.2012, Rs.2.5 lacs was released for the benefits of the claimants. A similar order for deposit was passed in MAC.APP.991/2011 filed by the National Insurance Company Ltd. on 01.12.2011. Vide order dated 28.02.2012 Rs. 2.5 lacs was also released in this matter.

28. The balance compensation lying deposited in this court may be released to the claimants proportionately as per the directions in the award.

29. The additional compensation amount along with interest @ 7% p.a. from the date of the filing of the claim petition till deposit in court be deposited in equal proportion by the two Insurance Companies before the Registrar General of this court within six weeks from today. On deposit of the enhanced compensation amount, the said amount be released to the widow of the deceased-Alpana Khandhway.

30. Statutory amount, if any, be refunded to the appellant Insurance Company

31. All interim orders stand vacated.

JAYANT NATH, J

NOVEMBER 27, 2014

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