

GAHC010142312010



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./141/2010

MOSSTT. NOORBHAN BEWA WIFE and ANR
W/O LATE JAINAL HOQUE.

2: ON THE DEATH OF MOSSTT MAUSARA BEWA HER LEGAL HEIRS
x

2.1: MD. MAINUL HOQUE
S/O- GOI MOHAMMAD SEIKH R/O- VILL.- HUDUMKHATA
DIST.- KOKRAJHAR
ASSAM

2.2: MD. ABU TAHER SHEIKH
S/O- GOI MOHAMMAD SEIKH R/O- VILL.- HUDUMKHATA
DIST.- KOKRAJHAR
ASSAM

2.3: MD. MONTUS ALI
S/O- GOI MOHAMMAD SEIKH R/O- VILL.- HUDUMKHATA
DIST.- KOKRAJHAR
ASSAM

3: NUR AHMED ALI
AGED ABOUT 18 YEARS

SON OF JAINUL HOQUE

NAME OF THE MOTHER-MOSSTT NOORBHAN BEWA. (APPLICANT NO 2 IS
MINOR AND THE APPLICANT NO 1 IS MAJOR AND WILL REPRESENT THE
APPLICANT NO 2 IN THIS INSTANT CASE)

4: MD NIJANUR HUSSAIN
AGED ABOUT 16 YEARS- MINOR
SON OF JAINUL HOQUE

NAME OF THE MOTHER -MOSSTT NOORBHAN BEWA

APPLICATION NO.1 AND 2 BOTH ARE RESIDENT OF VILLAGE
HUDUMKHATA

P.S. GOSSAIGAON

DISTRICT-KOKRAJHAR
ASSA

VERSUS

THE DIVISINAL MANAGER, NATIONAL INSURANCE CO. LTD. and 2 ORS
NATIONAL INSURANCE CO. LTD., DIVISIONAL OFFICE AT BONGAIGAON,
P.O., P.S. and DIST. BONGAIGAON, ASSAM.

2:THE BRANCH MANAGER

NATIONAL INSURANCE CO. LTD.
BRANCH OFFICE AT KOKRAJHAR
P.O.
P.S. and DIST. KOKRAJHAR
ASSAM.

3:PRAKASH JHA

S/O LATE JOPDEEP PRASAD JHA
PERMANENT RESIDENT OF GANGA NAGAR NEAR POLY PIPE FACTORY
P.S. SILIGURI
DIST. DARJEELING WEST BENGAL
PRESENTLY RESIDING AT GOSSAIGAON
WARD NO. 1.P.O. and P.S. GOSSAIGAON
DIST. KOKRAJHAR
ASSAM.OWNER OF VEHICLE NO. WB-73/A 9552 407 TRUC

Advocate for the Petitioner : MR. R S CHOUHAN

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 14.12.2023

Heard Mr. R.S. Chouhan, learned counsel for the appellant as
well as Mr. R. Goswami, learned counsel for the respondent.

2. By this appeal filed under Section 173 of the Motor Vehicles Act, 1988 the appellants (the appellant no.2 has been substituted on her death) have assailed the judgment and order dated 30.10.2009, passed by the learned Member, MACT, Kokrajhar in MAC Case No. 51/2007. It may be mentioned that on death of the appellant no. 2 in course of this proceeding, she has been duly substituted by her legal representatives.

3. The appellant no. 1 is the wife of the deceased. The original appellant no.2 (since deceased and duly substituted) was the mother of the deceased.

4. As per the claim petition, Jainal Hoque, had died in a road traffic accident that took place on 10.05.2007 at NH 31-C near Bismuri Relief Camp under Kokrajhar Police Station, which involved a 407 truck owned by the respondent no.3, which was being driven by the deceased. It was projected that the accident happened due to mechanical defect in the vehicle. It was claimed that the deceased, who was under employment of the respondent no.3 as a driver, was being paid monthly salary of Rs.2,000/- (Rupees two thousand only) per month and was also being provided with a daily allowance of Rs.100/- (Rupees one hundred only) and accordingly, the deceased was earning a sum of Rs.5,000/- (Rupees five thousand) per month. The claim petition filed by the appellants- claimants was registered as MAC Case No. 51/2007, whereby a compensation of Rs.7,32,000/- (Rupees seven lakh thirty two thousand only) was claimed.

5. The insurer (respondent nos. 1 and 2) had filed a common written statement and disputed the employment along with the claim. The owner of the vehicle (respondent no.3) had filed his written statement and admitted the employment of the deceased under him and had stated that the

vehicle was duly insured.

6. On the basis of pleadings, the learned Tribunal had framed the following 4 (four) issues for consideration and decision:

- i. Whether there is a cause of action of this case?*
- ii. Whether death was caused due to accident of the vehicle No. WB-73/A-9552 at Bismuri under P.S. Kokrajhar ?*
- iii. Whether the vehicle was duly insured with National Insurance Company Ltd. on the relevant day of occurrence?*
- iv. Whether the claimants are entitled to get compensation as prayed for?*

7. The appellants- claimants had examined 3 (three) witnesses, namely, Musstt. Noorbhan Bewa (appellant-claimant no.1) as PW-1; Musstt. Mansura Bewa (appellant-claimant no.2) as PW-2 and Dilip Kumar Prasad as PW-3, and following 5 (five) documents were exhibited in support of the claim petition, viz., certified copy of FIR (Ext.1); certified copy of seizure list (Ext.2); certified copy of post-mortem report (Ext.3); original copy of police report (Ext.4); and original copy of salary certificate (Ext.5).

8. The learned Tribunal, on examination of the evidence on record and upon hearing the learned counsel for the appellants and the respondent nos. 1 and 2, accepted the projection of death of the deceased in a road traffic accident while driving the vehicle in reference. The appellants had proved the certified copy of the FIR (Ext.1), Seizure List of the vehicle (Ext.2), and Post Mortem Report (Ext.3). The road accident had occurred on 10.05.2007 at about 09.30 AM in the place referred to hereinbefore. Though all the issues were decided in favour of the appellants-claimants, but by discarding the salary certificate, the learned Tribunal took into consideration the notional income as per the structural formula provided in the Motor Vehicles Act, 1988, assessing it

at Rs.10,000/- (Rupees ten thousand only) per annum after deducting one-third income towards personal expenses and by considering the age of the deceased as 23 years, applied the multiplier of 17 (seventeen) and the quantum of compensation was assessed at Rs.1,70,000/- (Rupees one lakh seventy thousand only), incidental expenses including funeral expenses at Rs.5,000/- (Rupees five thousand only), Rs.8000/- (Rupees eight thousand only) as for the loss of estate and loss of love and affection. Accordingly, the total compensation was assessed at Rs.1,83,000/- (Rupees one lakh eighty three thousand only).

9. By filing this appeal, the quantum of compensation has been assailed on the ground that the notional income considered was too low and there was no reason to disbelieve the income of the deceased at Rs.5,000/- (Rupees five thousand only) per month. In support of his submissions for enhancement of compensation, the learned counsel for the appellants had placed reliance on the case of *Mohd. Ameeruddin & Anr. V. United India Insurance Co. Ltd.. & Anr., (2011) 1 SCC 304*.

10. The learned counsel for the respondent has contested the claim for enhancement.

11. On a perusal of the LCR, it is seen that the Musstt. Noorbhan Bewa, PW-1 (wife of the deceased), and Musstt. Mansura Bewa PW-2 (mother of the deceased), who were the claimants had not exhibited any document. The PW-1, in her cross-examination had admitted that no income certificate was produced by her.

12. It further appears from the contents of the claim petition that the projected case of the appellants-claimants is that the deceased was earning a monthly salary of Rs.2,000/- (Rupees two thousand only) and daily allowance of

Rs.100/- (Rupees one hundred only) per day and on the said basis, the income of the deceased was calculated at Rs.5,000/- (Rupees five thousand only) per month.

13. Dilip Kumar Prasad, who was examined as PW-3, had exhibited all the five documentary exhibits referred to hereinbefore. It is surprising to note that he is the son of respondent no. 3, the owner of the vehicle involved in the accident. There is no explanation why he could produce the appellants' documents from his custody, when his father was the opposite party no. 3 in the claim petition. In para-3 of his evidence-on-affidavit, had admitted that the respondent no. 3, the owner of the vehicle was his father. In para-4 of his evidence-on-affidavit, the PW-3 had specifically admitted that he had heard from his father that the deceased had earned Rs.5,000/- as salary including daily allowance. The said statement means that he is a hearsay witness. Moreover, in the salary certificate (Ext.5), the author, i.e. respondent no. 3 had stated that he paid Rs.2,000/- only as monthly salary and Rs.100/- (Rupees One hundred only) per day to the deceased. The signature on Ext.5 was neither exhibited nor proved. Moreover, the said salary certificate is undated. There is no explanation why the respondent no. 3 had handed over the said salary certificate (Ext.5) to his son i.e. PW-3 and not to the appellants- claimants.

14. Thus, from the contents of the salary certificate (Ext.5), it is not proved, even by preponderance of probability, that the deceased was having a monthly earning of Rs.5,000/- per month.

15. In the case of *Mohd. Ameeruddin & Anr. (supra)*, the Supreme Court of India had deprecated the exclusion of daily allowance to the driver by observing that there was no evidence that the driver was not being paid daily allowance every day. However, in this case the distinguishing feature is that the

author of the Ext.5 was not summoned to prove the said salary certificate (Ext.5). The son of respondent no. 3 had admitted in para-4 of his evidence-on-affidavit that he was told by his father about payment which was being given to the deceased. Yet, the salary certificate (Ext.5) did not quantify the projected monthly earning of the deceased at Rs.5,000/-. Thus, one has to presume that the deceased was getting allowance of Rs.100/- per day, which is not contained in the document proved by PW-3 as Ext.5.

16. The salary certificate (Ext.5) is undated, and has been produced from the custody of a third person, who is neither the claimant, nor he is the author thereof, and who cannot be said to be the custodian of the documents exhibited as Ext.1 to Ext.5.

17. The learned counsel for the appellant had submitted that if document produced by a third party was not acceptable, why did the learned Tribunal accepted the voter id and post mortem report to construe the age of the deceased at 23 years. We do not intend to answer the said query because the said part of the decision of the learned Tribunal is not under challenge.

18. It may be mentioned that during cross-examination, the PW-3 is found answering to the effect that *"In Ext.5, I have mentioned that I paid Rs.2,000/- as the monthly salary and Rs.100/- as his daily allowance for which I have not issued any money receipt. It is not a fact that I have not paid Rs.2,000/- to deceased driver as salary and Rs.100/- as daily allowance."* Thus, the PW-3, appears to have been falsely deposing before the learned Tribunal by projecting as if he was paying monthly salary to the deceased.

19. The only issue which arises in the case is whether the discarding of Ext.5 to disbelieve income of the deceased at Rs.5,000/- per month is

sustainable on facts and in law.

20. As indicated herein before, the salary certificate (Ext.5) has not been proved by the author of the said document. It has not been produced from the proper custody, not being produced by the claimants or by respondent no.3. Moreover, the PW-3 has admitted in para-4 of his evidence-on-affidavit that he was a hearsay witness, who was told by his father about the income of the deceased.

21. Therefore, the decision of *Mohd. Ameeruddin & Anr. (supra)* does not help the appellants in any way.

22. The Court does not find any infirmity in the decision of the learned Tribunal to take into consideration the notional income of the deceased and not the income as per Ext.5.

23. Thus, this appeal fails and the same is dismissed. The parties are left to bear their own cost.

JUDGE

Comparing Assistant