

GAHC010204512014



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

Case No. : MACApp./34/2014

UNITED INDIA INSURANCE CO. LTD.,
HAVING ITS REGISTERED OFFICE AND HEAD OFFICE AT 24 WHITES
ROAD, CHENNAI AND ITS REGIONAL OFFICE AT G.S.ROAD, DISPUR,
GUWAHATI AND REPRESENTED BY CHIEF REGIONAL MANAGER,
GUWAHATI REGIONAL OFFICE, G.S. ROAD, DISPUR, GUWAHATI.

VERSUS

GAUTAM DAS and 4 ORS,
S/O LATE GOLOK CHANDRA DAS

2:SMTI BHOBANI DAS

W/O LATE GOLOK CHANDRA DAS

3:PANKAJ DAS

S/O LATE GOLOK CHANDRA DAS

4:MISS NIRMALI DAS

S/O LATE GOLOK CHANDRA DAS RESPONDENTS 3 and 4 BEING MINORS
ARE REPRESENTED BY THEIR MOTHER RESPONDENT NO. 2 ALL ARE
RESIDENTS OF VILL.AZARA HIRAPARA
P.S. AZARA
GUWAHATI 781017
DIST.KAMRUP
ASSAM.

5:KENDRIYA HINDI SIKSHAN MANDAL

GOVT. OF INDIA E-21

KAILASH COLONY
NEW DELHI 110048 OWNER OF VEHICLE NO. DL 3C/AA-568

Advocate for the Petitioner : MR.I ALAM

Advocate for the Respondent : MS. R BORA (R1-4)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT & ORDER (CAV)

Date:22.01.2024

The insurance company has preferred an appeal against the judgment and order, dated 13.09.2012 in MAC Case No.182/2004 passed by the learned Additional District Judge FTC No.2/Member, MACT, Kamrup, Guwahati.

2. This appeal has been filed on the ground that the learned Additional District Judge FTC No.2/ Member, MACT Kamrup did not take into consideration the following facts while directing the appellant insurance company to pay the awarded amount with a liberty to recover the same from the owner of the vehicle:

- i) The deceased who was driving the vehicle insured by the appellant was not the third party;
- ii) The driving licence of the victim driver had expired about four years back resulting in violation of policy conditions;
- iii) Although the claim petition was filed under Section 163 A of the MV Act as per which the maximum income that can be considered is Rs.40,000/- per year but the income was considered by the tribunal as Rs.94392/- resulting in violation of statutory provisions;
- iv) The fact that the claimant was given employment by the owner of the vehicle after death of his father was not considered by the learned Member, MACT. Hence, the claimant /respondent No.1 was not

considered as dependant while assessing compensation.

3. According to learned counsel for the appellant, the person driving the vehicle is not a third party and therefore the Member, MACT ought not have taken recourse to the remedy pay and recovery.

4. It is argued by learned counsel for the appellant that the Member, MACT ought to have considered that the owner of the vehicle which is a government organisation, had a duty to check the validity of licence of the driver of the vehicle before allowing him to drive the same. Under the facts, the Member, MACT ought to have directed the owner of the vehicle which is a government organisation to satisfy the award instead of directing the appellant insurer to initially satisfy the award of the tribunal with liberty to recover the same from the owner of the vehicle.

5. It is pertinent to say that none appeared for the respondents' side. Though notice has been served through paper publication in respect of the respondent No. 5, but none appears to represent the respondent No. 5. It also appears that earlier one Ms. R.Bora, Advocate was represented on behalf of respondent Nos. 1 to 4. However, none appeared on the date of hearing. As the matter is pending since 2014, no further time is allowed to wait for some more days to argue the matter on behalf of the respondents. Judgment is delivered accordingly on merit on the basis of the documents available in the record.

6. The case of the claimant is that on the date of accident i.e. 04.03.2004, while the deceased was driving a Tata Sumo vehicle bearing No. DL-3C-AA-5684 from New Delhi to Guwahati, had met with an accident near Janpad, Sitapur under Athariya P.S. in Uttar Pradesh. Due to development of some mechanical snag in the vehicle, the driver had lost control over the vehicle and hit a road side tree. Due to the alleged accident, the driver of the vehicle sustained grievous injuries on his head and other parts of his body. He was immediately admitted in the King George Medical College Hospital in Lucknow. The deceased was the sole earning member of his family, consisting of his wife, two sons and one minor daughter. The deceased was employed as a driver in Kendriya Hindi Sansthan, Guwahati Centre and he was earning Rs.8826/- per month as his salary.

7. The learned counsel for the appellant contended that in a petition under Section 166 of

the MV Act, 1988, the entire responsibility lies with the respondent to prove the factum of rash and negligent driving on the part of the driver of the vehicle in accident. But in the instant case, the petition is not maintainable as the deceased himself was driving the vehicle and no other vehicle was involved in the accident. The accident was entirely the outcome of the rash and negligent driving of the deceased which led to his death, resulting in registration of a case under Section 279/304-A of the IPC against him, therefore, the claimant is not entitled to the compensation.

8. I have seen the policy of the vehicle vide Exhibit-7 which allowed coverage to the deceased. The policy is of a passenger vehicle and the limits of liability have been clearly laid out therein. The requirement for a person to drive the vehicle under the policy is that he must hold an effective driving licence at the time of accident and should not be disqualified from holding or obtaining such a licence. The deceased was holding driving licence vide Exhibit-6 which has been pointed out by the learned counsel for the appellant that the validity of the licence of the deceased driver had expired about 4 years back prior to the accident. Hence, the provisions of the insurance policy had been violated.

9. From the accident information report vide Exhibit-1, it reveals that a police case has been registered at Athariya Police station vide Athariya P.S. GDE No. 14 dated 04.03.2004. As per claim petition, due to development of some mechanical snag in the vehicle, the deceased driver lost control of the vehicle and hit a road side tree. It transpires that the accident occurred due to mechanical defect of the vehicle but not as a rash and negligent driving of the driver. Though the claimant initially filed claim case under Section 163-A of the MV Act but subsequently by filing a petition before the Member, MACT, the application was converted from 163-A to 166 of MV Act vide order, dated 04.10.2004 and the case was registered under Section 166 of MV Act.

10. Now the question comes whether the legal heirs of the deceased is entitled to get compensation as the claim petition was filed under Section 166 of MV Act under which the claimant is required to prove rash and negligent driving of the driver of the vehicle.

11. As I have already stated that the accident occurred due to mechanical defect of the vehicle as a result of which deceased driver had lost control over the vehicle and dashed

against a roadside tree and he died while taking treatment in the hospital.

12. The claimants being the legal heirs of the deceased put forth their claims under Section 166 of the Act. The insurance company contested the claim on the ground that the claim was not maintainable as the accident was the result of negligence of the driver himself and therefore, no advantage accrues to the 'tortfeasor'. A similar ground has been taken in the appeal i.e. the accident was caused due to the sole negligence of the driver of the vehicle in question and no other person was involved and as such, there cannot be a claim under Section 166 of the MV Act.

13. In the first instance, it would be expedient to understand the provision and purport of Section 166 of MV Act, which reads as follows:

“166. Application for compensation. - (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made
(a) by the person who has sustained the injury; or (b) by the owner of the property;
or (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. [Provided further that where a person accepts compensation under section 164 in accordance with the procedure provided under section 149, his claims petition before the Claims Tribunal shall lapse.] [(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed”.

14. The Act so far as it relates to claim for compensation arising out of accident is a benevolent piece of legislation intended to mitigate the difficulties of claimant who seek compensation amongst others on the death of a near one. A claim of compensation is based

on tortious liability while a contract of insurance is a contract of indemnity. The third party for whose benefit the insurance is taken and who files the claim under Section 166 of the Act has to establish that the driver was negligent in driving the vehicle which resulted in the accident and that the owner was vicariously liable and the insurance company was bound to indemnify the owner. Hence, a claimant is entitled to get compensation under Section 166 of the Act when the driver is a 'tortfeasor' was driving the vehicle rashly and negligently.

15. Now, what arises for consideration is what does 'rashly' and 'negligently' mean. What constitutes 'negligence' has been defined in Halsbury's Laws of England as follows-

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence; where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to beMAC App. No.02 of 2016 8 likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the respective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger; the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may accordingly in some circumstances involve liability as being negligent although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two."

16. Rashness although closely allied to negligence is distinguishable in that in cases of rash act, the party does an act which he is bound to forbear. From the principles enunciated above and from a consideration of the evidence and documents on records, there is undoubtedly an act of negligence on the part of the deceased . As I have already mentioned that the accident occurred due to mechanical defect of the vehicle. If the driver would have control over the vehicle, he could have avoided the accident.

17. From the submissions herein above, it is clear that on the one hand, the appellant claims that the onus of accruing rash and negligent driving lies with the claimant and then admits that the accident was caused solely due to the rash and negligent driving of the

deceased as a result of which a case was registered in the police station.

18. It would be apposite now to consider whether the claimants respondent Nos. 1 to 4 can seek compensation on account of the death of the 'tortfeasor' as a third party. It is not denied that the owner had insured the vehicle with the appellant. The insurance policy between the insurer and insured is a contract between the two parties. The insurer undertakes to indemnify the insured against the claim of a third party and to compensate the loss suffered by the insured on account of risk covered by the insurance policy. The scheme of Section 147 of the MV Act envisages *inter-alia* that the policy of insurance is to be issued by the authorised insurer and must insure the specified person or classes of persons against any liability incurred in respect of death or bodily injury to any person or damage to any property of a third party. Sub-Section –(2) of Section 147 of the Act lays down the extent of liability. In the case of property of a third party, the limit of liability is Rs.6000 only with a proviso, whereas Sub Section (3) provides that the policy of insurance will be of no assistance unless and until the insurer has issued a certificate of insurance in the prescribed form.

19. In the case of *National Insurance Company Ltd. –vs- Suraj Subba & anr.* reported in AIR 2014 SC 7, it was held that in case where the deceased was the husband of the insured, had a valid driving licence and died while driving the insured vehicle, as he was not a party to the agreement of insurance would undoubtedly fall within the meaning of third party.

20. In the case in hand, it would, however, be worthwhile to notice that the accident occurred on account of negligent driving of the deceased driver which would tantamount to contributory negligence on his part. In the case of *Rajrani & Ors –vs- Oriental insurance company Ltd.* reported in (2009) 13 SCC 654, the Hon'ble Apex Court held as follows:

"17. So far as the issue of "contributory negligence" is concerned, we may notice that the Tribunal has deducted 1/3rd from the total compensation on the ground that deceased had contributed to the accident. The same, we find, has been upheld by the High Court. This Court in [Usha Rajkhowa v. Paramount Industries](#) [(2009) 14 SCC 71] discussed the issue of contributory negligence noticing, inter alia, earlier decisions on the same topic. It was held that (SCC p. 75, para 20)

"20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in [Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak](#) [(2002) 6 SCC 455]. That was also a case of collision between a car and a truck. It was observed in SCC p.458, para 8:

*'8. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong". * * * * **

“18. The principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases before this Court. In Krishna Vishweshwar Hede v. Karnataka SRTC [(2008) 15 SCC 771] this Court upheld the judgment of the Tribunal assessing the ratio of liability at 50:50 in view of the fact that there was contributory negligence on the part of the appellant and fixed the responsibility for the accident in the ratio of 50:50 on the driver of the bus and the appellant.”

MAC App. No.02 of 2016 17

21. Coming to the question of validity of the driving licence of the driver, according to learned counsel for the appellant, driving licence of the driver had expired prior to four years of the accident. But to prove the fact, no witness was examined and no document has also been exhibited by the insurance company. Learned tribunal did not utter a single word regarding validity of licence of the deceased driver in the judgment . One of the claimants i.e. the wife of the deceased was examined in the case as PW-1 and she proved the driving licence of her husband vide Exhibit-6. There is no cross-examination on the point that at the relevant time of accident, the deceased driver had no any valid licence. The accident information report is also silent regarding the validity of the driving licence of the deceased driver. From exhibit-6 which is a zerox copy of the driving licence, it cannot be ascertained when the validity of the licence was expired. As the matter has not been agitated when PW-1 was cross examined, at this stage without furnishing any driving licence of the deceased, the appellant is not permitted to take the plea that the deceased driver had no valid or effective driving licence on the date of accident.

22. Regarding pay and recovery, the tribunal observed in the judgment which reads as follows:

“From Exhibit-1, accident information report, which reveals that the "driver had not possessed valid driving licence and the vehicle was insured with the opposite party No.2 at

the relevant time of the accident. As such, the insurance company is at liberty to recover the amount from the owner of the vehicle in due course and due process of law as observed earlier.”

23. But in Exhibit-1, there is no mentioning of any driving licence number of the driver of the vehicle. It is not understood on what basis the tribunal had come to the conclusion that the driver was not having any valid licence on the relevant date of accident. Hence, the judgment of the Tribunal directing on mode of pay and recovery is set aside.

24. In view of the above, it is evident that the claimant is entitled to the compensation. As held in Rajarani (supra), 50% of the total amount of loss of dependency is to be deducted for contributory negligence.

25. As the son of deceased was major and he was employed after the death of his father in the same organisation, as such, dependants of the deceased was three. As per Sarala Verma(supra) one third of the income of the deceased be deducted for his personal and living expenses.

26. The Hon'ble Apex Court in the case of *National Insurance Company Ltd. vs Pranay Sethi and Ors.* reported in *SLP(Civil) no 25590 of 2014* has held that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30% if the age of the deceased was between 40-50 years. In case the deceased was between the age of 50-60 years, the addition should be 15%.

27. As per ***SLP(Civil) No. 25590 of 2014 (National Insurance Co. Ltd. Vs- Pranay Shethi & Ors.)*** the Hon'ble Supreme Court has fixed compensation in case of death reasonable figures on conventional heads namely- Loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs.15,000/- and Rs. 40,000/- respectively. As per the impugned judgment, the aforesaid amount should be enhanced at the rate of 10% in every three years. Hence, amount of funeral expenses comes to Rs.16,500/-, consortium Rs.44,000/- and loss of estate Rs.16,500/-.

28. In the present case, monthly income of the deceased was Rs.8,826/-. The age of the deceased was around 55 years when the accident took place. Hence, 15% be added to the established income of the deceased i.e. Rs. 8,826/-+Rs.1,324/-=Rs.10,150/-.

29. As per the case of *Sarla Verma vs DTC* reported in *AIR 2009 (6) SC 121*, the multiplier would be 11.

30. In view of the above discussion, the computation of compensation is awarded as follows-

(a) Annual income of the deceased=Rs.10,150/-X12=Rs. 1,21,800/-

(b) After deducting 1/3 of the income of the deceased the amount comes to Rs.81,200/-

(c) After multiplying with multiplier, the amount

comes to Rs. 81,200/-X11=Rs.8,93,200/-

(d) 50% be deducted for contributory negligence of the deceased, the amount comes to Rs. 4,46,600/-

(d) Funeral expenses=Rs. 16,500/-

(e) Spousal consortium= Rs.44,000/-

(f) Loss of Estate= Rs. 16,500/-

Total = Rs.5,23,600/- (Rupees Five Lakh Twenty Three Thousand Six Hundred) only.

31. In the result, the appeal is partly allowed. The compensation and award is modified as described above. The United India Insurance Company Ltd. is directed to deposit Rs. 5,23,600/- to the wife of the deceased in her savings account in any nationalized bank through NEFT. The claimant No.2 is directed to furnish her bank details of any nationalized bank to the Insurance Company for necessary payment. The compensation so awarded shall carry an interest @6% per annum from the date of filing of the case till full and final realization. Any amount, if paid earlier, be adjusted accordingly.

32. Statutory amount in deposit be refunded to the Insurance Company.

33. With the above observation, the appeal stands disposed of.

Send back the LCR.

JUDGE

Comparing Assistant