IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.84 of 2011
In
CLAIM CASE 438 of 2007

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1. Madhu Agrawal wife of Late Sanjay Kumar Agrawal.
2. Satyanarayan Prasad son of Late Nanhu Sao.
3. Smt. Satyawati Devi, wife of Satyanarayan Prasad.
4. Abhinav Anand @ Shivam, Minor son of Late Sanjay Kumar Agrawal.
5. Niharika Agrawal, Minor daughter of Late Sanjay Kumar Agrawal.

All residents of 410, Mahima Place, Govind Mitra Road, P.S. Pirbahore, Patna.

.... Appellant/s

Versus

1.National Insurance Company.
2.Samir Sourabh, proprietor – Mata Di Tubewell Constuction. Resident of Bahibpura Sohsarai Asadpur Satpura P.S. Sohsarai, Nalanda.
3. Moti Lal son of Late Bindeshwar Lal, Resident of village Quamruddinganj P.O. Biharsharif, P.S. Bihar, Nalanda.

.... Respondent/s

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Appearance :
For the Appellant/s : M/s.Alok Kumar Shahi & A.Sinha, Adv.

For the Respondent/s : Mr. Ashok Priyadarshi, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL ORDER

12 14-09-2015 Heard counsel for the appellants and the respondents.

I.A.No.634 of 2015 has been filed for condoning the delay of long delay of 1 year, 5 months and 13 days. Looking to the nature of case, I.A. is allowed and the delay in filing the appeal is condoned, subject to payment of Rs.5,000/- in the Patna High Court Legal Aid Services Authority. The receipt showing such deposit should be filed within one month from to-day.

In this case, appellants are not satisfied with the amount of compensation awarded to them vide judgment and award dated 25th September 2010 and 3rd March 2011 respectively whereby and whereunder the court below has granted compensation amounting to Rs.,6,82,950/- along with 6 per cent interest.

Short facts of the case is that Sanjay Kumar Agrawal was going to Ranchi from Patna on 20th November 2007 by Alto Car bearing Regd No. BR-1AE / 5546 and while the car reached near Latpahiya More, Kodarma, in the meant time, the offending truck bearing Regd. No. BR-1G /9037 coming from opposite side rashly and negligently, dashed the said Alto Car as a result of which the victim died on way to the Hospital for which Kodarma P.S.Case No. 534 of 2007 was registered on 20th November 2007 u/s 279, 338, 304A IPC.

At the time of death, it has been claimed that the victim was earning Rs.12,137/- per month and on that basis present claim application was filed. At the time of accident, the offending truck was insured by the National Insurance Company was impleaded as party. During the trial, the appellants examined altogether four witnesses, namely, A.W.1 Madhu Agrawal, the present appellant, A.W.2 Satya Narayan Prasad, A.W.3 Gyan Prakash Ojha and Uma Shankar Agrawal. The Tribunal has considered the evidence of all the witnesses, including A.W.3

Gyan Prakash Ojha who claimed that he was traveling in the said car which was dashed by the offending vehicle but the court below has arrived to a conclusion that the accident took place on account of contributory negligence of the driver of the car as well as of truck and, accordingly, the Insurance Company was saddled with 50 per cent of the compensation amount.

Counsel for the appellants has submitted that the court below has committed illegality in holding that it was a case of contributory negligence and, as such, the National Insurance Company is liable to pay 50 per cent of the compensation amount whereas the fact emerges the accident took place on account of negligence of driver of truck and there was no laches and negligence on the part of the driver of Alto Car as when he had seen the truck coming straight from the opposite side, he stopped his car in the extreme left even then the truck dashed the standing car which cannot be said to be an act of negligence on the part of driver of the car.

Further he has submitted that the court has wrongly deducted an amount which has been invested from his earning in the NSC as well as in the LIC which was required to be taken into consideration for the purpose of computing compensation amount when maximum deduction of $1/3^{rd}$ has been allowed, there is no question for further deduction of amount received from his own earning, as per the circular issued by the Income Tax Department made provisions under the Income Tax Act for investment of Rs.1,00,000/- to be excluded from the assessment of tax. He has further submitted that the court below has not taken into consideration the compensation amount under future prospect as well as the court has not granted the benefit of consortium, love and affection of children and loss of estate so much so the funeral expenses has also been given on the lower side. He has further submitted that the evidences which were led before the Tribunal shows much clearly that the driver of the car, was not at fault which has been stated by A.W.3 Gyan Prakash Ojha who also received injury in the said accident and he was also treated in the Hospital. So he is the best witness and his evidence cannot be ignored lightly by the Tribunal.

Counsel for the Insurance Company submitted that when there is a head-on collusion and the court has arrived to the conclusion that the accident had taken place due to contributory negligence, this Court should not interfere with the finding of fact recorded by the Tribunal. He has further submitted that for getting clear picture it will be required whether it was a case of contributory negligence or was negligence on the part of truck driver only who dashed the standing Alto Car will be better the matter should be remanded back for fresh consideration and also submitted that the taxable income should also be deducted while making computation of the compensation amount.

Having considered the rival contention of the parties, as the Tribunal has arrived to a conclusion of contributory negligence it will be appropriate for this Court to discuss and find out whether the materials are sufficient for arriving to a conclusion of contributory negligence or the case is required to be remanded back for fresh consideration.

It is a fact that the Insurance Company has not examined its Surveyor to indicate situational picture of accident where two vehicles were standing. The present case be decided only on oral evidence of the parties. The Insurance Company has not examined any witness in support of its case whereas the four witnesses have been examined by the appellant A.W.1 Madhu Agrawal has proved the income tax return and submitted that on 20th November 2007 her husband was going to Ranchi and in Kodarmaghati accident took place in which her husband died. It has been stated that the said vehicle was dashed by the truck and on that account her husband died on the spot itself. This witness was not going along with the deceased. So she was only a hearsay witness, does not carry much weight. A.W.2 Satya Narayan Prasad, father of Sanjay Agrawal has stated that his son was running a shop in Ashok Rajpath, Patna a was income tax payee, produced Return for the Assessment year 2006-07 for Rs.1,45,640.00 and stated that on account of negligence of driver of the truck, the truck dashed the Alto Car as a result of which his son received injuries and ultimately died. He is also a hearsay witness.

The very important witness A.W.4 Gyan Prakash Ojha stated that on 20th November 2007 was occupant of the said car was going to Ranchi along with Sanjay Kumar Agrawal has specifically stated that after the accident, Bimla Devi had died on the spot and Sanjay Kumar Agrawal died on way to Kodarma Hospital. Shivam Kumar and driver Amit Kumar were seriously injured and were being treated in the Hospital. He further stated he also received injury in the said accident and in his evidence he stated that Amit Kumar, when he saw the truck was coming from the opposite side, he kept his car in the extreme left side even then the truck had dashed the car. He is eye witness to the accident because he was one of the occupants of the car. In his cross examination, the Insurance Company has not put any question that he was not in the car and has not disputed the fact stated by this witness. So he is very material witness for deciding this case.

Uma Shankar Agrawal is A.W.4 who has stated in his evidence that the income of the victim was Rs.1,45, 640/-. He has also produced the PAN of the deceased, also proved the Return filed in the Income T ax Department. The documentary evidence has also been filed by the appellant s. The Income Tax Return is Ext-2, FIR is marked Ext-3, charge-sheet is Ext-H, Ext-5 is the Owner Book of the truck, Ext-6 is the Insurance paper and Ext-7 is the driving licence of the driver whereas Ext-8 is the P.M.Report.

Now it has to be seen whether the materials are sufficient for recording the finding of contributory negligence. The Insurance Company has not examined any witness and has not produced any Surveyer report, as well as photograph showing position of vehicle whereas the appellants examined A.W.3, namely, Gyan Prakash Ojha who was occupant of the car and received injury. Whether his evidences are sufficient for recording a finding because of the negligence of the truck driver accident took place or it was a case of contributory negligence. On perusal of evidence of Gyan Prakash Ojha, A.W.3 who has given detailed description of accident where he has stated that the driver of the car after looking to the truck coming opposite side rashly and negligently had stopped his vehicle in the extreme left side even then the offending vehicle dashed the car. In the cross-examination, nothing has been asked on this point from the side of Insurance Company itself shows evidences are sufficient to record the finding. In such view of the matter, the evidence of Gyan Prakash Ojha cannot be said not sufficient and can be brushed aside on acceptance of statement, in such view, it is very difficult to arrive to a finding of contributory negligence.

This Court is of the view that the court below has wrongly recorded the finding of contributory negligence against the weight of evidence. When the occupant of the car received injury in the said accident stated that the driver kept the car in the extreme left side of the road even then the truck dashed, it cannot be a case of contributory negligence but is out and out laches and negligence on the part of truck driver. In such view of the matter, the finding recorded by the Tribunal is set aside and it is held that it was wrong done by the truck driver and as such the Insurance Company will have to indemnify the owner of the truck of the entire amount of compensation.

The Tribunal while calculating the compensation amount has refused to take into consideration the amount he invested under the NSC as it has been submitted that the amount was deposited in order to save the tax as provided under Section 80 of the Income Tax Act and the said amount cannot be ignored in view of judgment of the Hon'ble Supreme Court reported in (2010)12 SCC 378 (Shyamwati Sharma and others .v. Karam Singh and others) where the Hon'ble Supreme Court said that deduction of Income Tax is permissible whereas the amount deducted under GPF, Insurance Premium and payment of loan amount should not be excluded from the income. In view of the said judgment, the amount invested by the deceased under the NSC should be also treated to be part of income and will be basis for computing compensation.

The next point that has been raised is that the Tribunal has only granted Rs.5000/- under consortium is enhanced to Rs.25,000/-. As the Tribunal has not granted compensation under future prospect, as the age of the victim was 42 years, he will be entitled to 30 percent additional amount as has been held by the Hon'ble Supreme Court in the case of Rajesh v. Rajbir Singh (2013)9 SCC 54 and, as such, the appellants are held entitled to additional 30 % of the amount computed under the head future prospect. As has been claimed that total dependent on the deceased was five, deduction towards personal expenses in stead of 1/3rd, will be $1/4^{th}$.

Accordingly, the court below is directed to make deduction of $1/4^{th}$ towards personal expenses and for loss of estate and for funeral expenses, it will be Rs.10,000/-. Accordingly, the order is modified to the aforesaid extent.

The Court below is directed to revise the award accordingly and the Insurance Company is directed to make payment of difference amount within three months from the date of receipt/production of copy of the award. So far interest on the revised amount will be from the date of filing of the application.

Accordingly, the appeal is allowed to the aforesaid extent.

(Shivaji Pandey, J)

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