

HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

M.A.C.M.A. No.864 OF 2009

JUDGMENT:

This appeal is filed by the insurance company challenging the judgment and award dated 31.3.2008 passed in O.P. No.1123 of 2005 on the file of the Motor Accidents Claims Tribunal-cum-I Additional District Judge, Nizamabad, wherein and whereby the Tribunal while awarding an amount of Rs.9,81,000/- towards compensation to the petitioners fastened the liability on the insurance company.

2. The parties hereinafter will be referred to as they are arrayed before the Tribunal to avoid confusion.

3. The facts leading to filing of the present petition are briefly as follows: On 22.5.2004 at about 7.30 PM, Bollam Karunakar (hereafter referred to as, the deceased) was proceeding to Argul village from Balkonda on motor cycle bearing No.AP 25H 0398. When he reached Argul shivar on NH.7 the driver of lorry bearing No.AP 26W 3137 had driven the same in a rash and negligent manner and hit the motor cycle of the deceased. Due to the accident, the deceased died on the spot. The Station House Officer, Jakranpally Police Station registered a case in crime No.29 of 2005 under Section 304-A IPC against the driver of the lorry. By the time of the accident, the deceased was aged about 30 years and used to earn Rs.80,000/- per month as a teacher and also agriculturist. Lorry bearing No.AP 26W 3137, which belongs to first respondent, was insured with the second respondent with effect from 19.3.2005 to 18.3.2006. The petitioners are dependants on the income of the deceased. The present petition is filed claiming a compensation of Rs.10,00,000/- from the respondent Nos.1 and 2 jointly and severally with interest and costs.

4. The first respondent remained ex parte. The second respondent filed counter denying all the material averments made in the petition inter alia contending that the lorry bearing No.AP 26W 3137 was not involved in the accident on 23.5.2005. The first respondent did not inform the accident in collusion with the petitioners. At the time of the accident, the deceased drove the motor cycle in zigzag manner and thereby caused the accident. The amount of compensation claimed by the petitioners under various heads is highly excessive and exorbitant.

5. Basing on the above pleadings, the Tribunal framed the following issues:

1. Whether the accident occurred on 23.5.2005 at about 07.30 p.m., due to rash and negligent driving of the lorry bearing No.AP 26W 3137 by its driver?
2. Whether the petitioners are entitled to compensation. If so, to what amount and from which of the respondents?
3. To what relief?

6. During the course of trial, on behalf of the petitioners, P.Ws.1 to 3 were examined and Exs.A1 to A21 were marked. On behalf of the second respondent, no oral or documentary evidence was adduced.

7. On appraising the oral and documentary evidence available on record, the Tribunal arrived at a conclusion that the accident was occurred due to the rash and negligent driving of the driver of the lorry bearing No.AP 26W 3137 and allowed the petition in part by awarding compensation of Rs.9,81,000/- with proportionate costs and interest at the rate of 7.5% per annum from the date of petition till the date of realisation, directing the respondent Nos.1 and 2 jointly and severally to deposit the amount within one month from the date of the award. Feeling aggrieved by the judgment and award, the second respondent – insurance company preferred the appeal.

8. Heard Sri A.V.K.S. Prasad, learned counsel for the appellant-insurance company and Sri J.Kanakaiah, learned counsel for the respondent Nos.1 to 5-claimants.

9. The contention of learned counsel for the appellant is that the Tribunal failed to appreciate that the accident occurred due to negligence on the part of the deceased. He further submitted that the Tribunal committed grave error while arriving at a conclusion that the deceased used to earn Rs.6,000/- per month. He also submitted that the Tribunal ought to have applied appropriate multiplier '17' instead of '18'. **Per contra**, learned counsel for the claimants submitted that the second respondent has not adduced any evidence to prove the contributory negligence, if any, on the part of the deceased. He further submitted that the Tribunal has awarded just and reasonable compensation.

10. Now, the points that arise for consideration in this appeal are:

- (1) *Whether there was any negligence on the part of the deceased to cause the accident? If so, to what extent he was responsible?*

(2) *Whether the Tribunal has awarded just and reasonable compensation to the petitioners or not?*

Point No.1:

11. In order to prove the manner of accident, first petitioner examined herself as P.W.1 and got marked Exs.A1 to A5. P.W.3 is the eye witness to the accident. As seen from the testimony of P.W.1, she is not eye witness to the accident and therefore, her testimony is not of much helpful to prove the manner of accident. Further, the oral testimony of P.W.1 coupled with Ex.A2 inquest panchanama and Ex.A4 post-mortem report clearly reveals that the deceased died due to the injuries sustained in the accident that occurred on 23.5.2005. As per the testimony of P.W.3, the accident occurred due to rash and negligent driving of the driver of the lorry. In the cross-examination, P.W.3 denied the suggestion that he did not witness the accident and he was deposing falsely. It is a known fact that the Police may not record the statements of all the persons, who have witnessed the accident. Merely because the Police did not record the statement of P.W.3 by itself is not a valid ground to discard his testimony in toto with regard to the manner of accident. As per the recitals of Ex.A1 and A3, certified copies of F.I.R and charge sheet respectively, the accident occurred due to rash and negligent driving of the driver of the lorry. A perusal of Ex.A5, certified copy of M.V.I. report, clearly reveals that there was no mechanical defect in the lorry. As per the recitals of the M.V.I. report, the lorry bearing No.AP 26W 3137 was involved in the accident that occurred on 23.5.2005. The predominant contention of the learned counsel for the second respondent is that the deceased was also equally responsible to cause the accident.

12. In ***Syed Sadiq Vs. Divisional Manager, United India Assurance Company*** the Hon'ble apex Court at para No.28 held as follows:

28. The High Court without assigning any reason concurred with the findings of the Tribunal with respect to contributory negligence. We find it pertinent to observe that both the Tribunal and the High Court erred in holding the appellants/ claimants in these appeals liable for contributory negligence. The Tribunal arrived at the above conclusion only on the basis of the fact that the accident took place in the middle of the road in the absence of any evidence to prove the same. Therefore, we are inclined to hold that the contribution of the appellants/claimants in the accident is not proved by the respondents by producing evidence and therefore, the finding of the Tribunal regarding contributory negligence, which has been upheld by the High Court, is set aside.

13. In ***Meera Devi Vs. Himachal Pradesh Road Transport Corporation*** the Hon'ble apex Court at para No.10 held as follows:

10. To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case.

14. Let me consider the facts of the case on hand in the light of the principle enunciated in the cases cited supra. Mere taking up the plea of contributory negligence in the counter by itself would not amount to proof of negligence on the part of the deceased. If really the accident occurred due to negligence of the deceased, what prevented the second respondent-insurance company to examine the driver of the lorry or any other eye witness to the accident? For the reasons best known, the second respondent did not choose to examine any person witnessed the accident to substantiate the stand taken by it.

15. Learned counsel for the second respondent has drawn my attention to the recitals of F.I.R (Ex.A1). As per the recitals of F.I.R., the dead body of the deceased was lying on the middle of the road. The contention of learned counsel for the second respondent is that if really the deceased was proceeding on the left side of the road, how the dead body was lying on the middle of the road was not properly explained by the petitioners. Admittedly the crime vehicle is a heavy goods vehicle. If a heavy goods vehicle hits a motor cycle, there is every possibility to fell motor cycle as well as the rider of motor cycle on the middle of the road. Merely because the dead body of the deceased was lying on the middle of the road, that itself is not a sufficient ground to draw an inference that the deceased was also responsible to cause the accident. The Tribunal or court can drawn an inference basing on the material available on record. The Tribunal or court is not supposed to draw inference basing on assumptions and presumptions. If really there was negligence on the part of the deceased what prompted the Police to register the crime against the driver of the lorry only. The Tribunal, after considering the material available on record, arrived at a conclusion that the accident occurred due to rash and negligent driving of the driver of the lorry. Absolutely there is no material on record to establish that the deceased was also responsible to cause the accident. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the accident occurred due to rash and negligent driving of the driver of the lorry bearing No.AP 26W 3137. The contention

of learned counsel for the second respondent-insurance company that the deceased was also responsible to cause the accident has no legs to stand. Point No.1 is accordingly answered against the appellant-insurance company.

Point No.2:

16. As per the testimony of P.W.1, her husband was working as a teacher. The testimony of P.W.3 reveals that by the time of accident the deceased was working as a school teacher and was drawing the salary of Rs.8,000/- per month. Even though the petitioners have produced the salary certificate of the deceased the Tribunal has taken the income of the deceased as Rs.6,000/- per month. A perusal of Exs.A7 and A8 reveals that the deceased possessed B.A., B.Ed., qualifications. As per Ex.A11 the deceased passed Typewriting lower grade examination. A perusal of Ex.A12 clearly reveals that deceased passed Secondary Grade Teachers examination. A perusal of Ex.A15 reveals that the deceased also attended for oral interview. Various documents filed by the petitioners clinchingly establish that the deceased passed SGT written examination and appeared for oral interview. Viewed from any angle, the deceased may earn Rs.6,000/- per month. There are no grounds much less valid grounds to reduce the monthly income of the deceased. The Tribunal deducted 1/3rd of the income i.e., Rs.2,000/- towards personal expenses of the deceased from out of Rs.6,000/-. The claimants are '5' in number and therefore, the Tribunal ought to have deducted 1/4th i.e., Rs.1,500/- towards personal expenses of the deceased in view of the decision in **Sarla Verma**. Thus, the deceased may contribute an amount of Rs.4,500/- per month to the family.

17. The material available on record clearly reveals that the deceased was aged about 30 years by the time of his death. The Tribunal has applied the multiplier '18' basing on second schedule to Section 163-A of the Motor Vehicles Act. As per the judgment of the Supreme Court in **Sarla Verma v DTC**, the appropriate multiplier applicable for the age group of 25 – 30 years is '17'. The Tribunal delivered the judgment much prior to the judgment in **Sarla Verma**. By applying the appropriate multiplier '17', loss of dependency, for which the petitioners are entitled to, comes to (Rs.4,500 X 12 X 17) Rs.9,18,000/-.

18. By the time of death of the deceased, first petitioner-wife was aged about 25

years. Hence, I am inclined to award Rs.25,000/- towards loss of consortium. Besides that, I am also inclined to award Rs.35,000/- towards loss of love and affection and an amount of Rs.3,000/- towards funeral expenses.

19. The Tribunal awarded an amount of Rs.1,00,000/- towards loss of future earnings. It is a settled principle of law that the Tribunal ought not to have granted compensation under 'loss of dependancy' as well as 'loss of future earnings'. Loss of dependency means loss of future earnings only. The Tribunal wrongly granted compensation under the head 'loss of future earnings'. Hence the petitioners are not entitled for this amount.

20. As per the decision of the Supreme Court in **Ranjana Prakash v Divisional Manager**, in an appeal filed by the insurance company the High Court cannot enhance the compensation without being regular appeal or cross-objections filed by the claimants. However, the High Court can examine and apply the relevant principles in determining the just compensation. Paras-6 and 8 are relevant, which are extracted hereunder:

6. We are of the view that the High Court committed an error in ignoring the contention of the claimants. It is true that the claimants had not challenged the award of the Tribunal on the ground that the Tribunal had failed to take note of the future prospects and add 30% to the annual income of the deceased. But the claimants were not aggrieved by Rs 23,134 being taken as the monthly income. There was therefore no need for them to challenge the award of the Tribunal. But **where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Tribunal, by pointing out other errors or omissions in the award, which if taken note of, would show that there was no need to reduce the amount awarded as compensation.** Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that the claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the

compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation.

21. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the petitioners are entitled to just and reasonable compensation under the following heads:

(1) Loss of dependency : Rs.9,18,000

(2) Loss of consortium : 25,000

(3) Loss of love and affection : 35,000

(4) Funeral expenses : 3,000

Total : Rs.9,81,000

22. Accordingly, point No.2 is answered holding that the Tribunal has awarded just and reasonable compensation, though it has committed error in awarding Rs.1,00,000/- towards loss of future earnings; applying the multiplier '18' instead of appropriate multiplier '17'; and deducting 1/3rd towards personal expenses of the deceased. However, the quantum of compensation awarded by the Tribunal is fair, just and reasonable.

23. In the result, the appeal is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any pending in this appeal, shall stand closed.

T.SUNIL CHOWDARY, J

Date: 23.02.2015

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