

\$-13

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

*Decided on: 10<sup>th</sup> April, 2015*

+ **MAC.APP. 474/2011**

**TATA AIG GENERAL INSURANCE CO LTD** ..... Appellant

Through: Ms. Shanta Devi Raman, Advocate

versus

**KEDARNATH & ORS** ..... Respondent

Through: Mr. D.K. Sharma, Advocate for Respondent  
No. 1 and 2

**CORAM:**  
**HON'BLE MR. JUSTICE G.P.MITTAL**

### **J U D G M E N T**

#### **G. P. MITTAL, J. (ORAL)**

1. This appeal is directed against the judgment dated 11.02.2011 passed by Motor Accidents Claim Tribunal whereby compensation of Rs. 4,76,000/- was awarded for the death of Tej Prakash, who suffered fatal injuries in a motor vehicular accident which occurred on 27.04.2006.
2. There is twin challenge to the impugned judgment. First, negligence on the part of the driver of two wheeler bearing no.DL-4S-AD-7824 was not established and second, the compensation awarded is

excessive as in the absence of any evidence with regard to good future prospects, addition of 50% was not permissible.

3. On the other hand, learned counsel for Respondents no.1 and 2 urges that negligence of the driver was sufficiently established from the testimony of PW2. It is urged by him that the compensation awarded is too meagre and low and the same needs to be enhanced.

### **NEGLIGENCE**

4. It is urged by the learned counsel for the Appellant that in respect of the accident, FIR No. 370/2006 was registered at Police Station Dwarka, Delhi. Statement of Abhay Kumar, driver of the two wheeler was recorded and on the basis of that statement, the criminal case was sent as untraced. It is urged that as per the statement made by the earlier said Abhay Kumar, some unknown vehicle had dashed against the two-wheeler from behind which was the cause of the accident. Thus, learned counsel for the Appellant argues that the accident was caused on account of negligence of an unknown vehicle and the insurer of two wheeler bearing no.DL-4S-AD-7824 is not liable to pay compensation for want of any negligence on the part of the driver of the two-wheeler.

5. The Claims Tribunal dealt with the issue of negligence and discussed in detail the statement of Vasudev (PW2) , an eye witness of the accident.
6. Eye-witness to the incident namely Vasudev, PW-2 deposed that on the date of the incident, he was present near the place of incident and he saw the motorcycle in question being driven at a very fast speed by Respondent no.1 Abhay Kumar, on which Tej Prakash was sitting on the pillion seat. He further deposed that the said motorcycle was being driven at a fast speed and its driver lost control over it. PW-2 deposed that the said motorcycle struck against the footpath, as a result of which Tej Prakash fell down and sustained injuries on his person. This witness was not at all cross examined on behalf of Respondents no.1 and 2, who during the course of proceedings, failed to appear and were proceeded *ex-parte*. In cross-examination on behalf of the Insurance Company PW-2 stated that his statement was not recorded by the police.
7. SI Rahul Kumar appeared in the witness box as PW-3 and proved copy of FIR as Ex. PW3/B. This witness however, on being cross examined stated that he was not the Investigating Officer of the present case and did not have any personal knowledge.

8. Admittedly, the police on conclusion of investigation had prepared a final report. However, Petitioners during the course of proceedings had examined Sh. Vasudev, who categorically deposed that the accident took place in his presence. If the Investigating Officer during the course of investigation, for the reasons best known to him, failed to examine this witness, then lapse on the part of the investigating agency cannot stall the rights of the Petitioners to get compensation from the tortfeasor. Respondents no.1 and 2 during the course of proceedings had failed to appear and the Insurance Company had not summoned the Investigating Officer of the present case.
9. Had the Investigating Officer appeared or been summoned by the Insurance Company, he could have disclosed the reasons for not recording statement of Vasudev during the course of investigation, but that was not done.
10. Having regard to the facts and circumstances of the case and material on record, I am of the considered opinion that there is no involvement of any third vehicle in the present incident. More particularly, in view of the deposition of the eye witness to the incident PW2 Vasudev, who deposed that the motorcycle on which the deceased was travelling as pillion rider was being driven by Respondent no.1. As per the material

on record, the said motorcycle struck against the footpath which resulted in this unfortunate accident and sustaining of fatal injuries on the person of deceased Tej Prakash, a bachelor son of the petitioners.

11. Having regard to these facts, I am of the considered opinion that Respondent no.1 was driving the motorcycle at such a speed that he lost control over the same, which in itself speaks about the negligent manner in which he was driving the offender motorcycle.
12. I may mention that the statement made by Abhay Kumar to the police under Section 161 Cr.P.C. can be used only for the purpose of contradiction. Statement of Abhay Kumar under Section 161 Cr.P.C. was rightly not given any value by the Claims Tribunal in view of the statement of Vasudev (PW2). It is possible that Abhay Kumar wanted to escape from the criminal liability and hence, the self serving statement made by him will be of no consequence. PW2 categorically deposed about the manner of the accident. He was categorical that the two-wheeler driver was driving the motorcycle bearing no.DL-4S-AD-7824 at a fast speed and that he had lost control. Although the veracity of PW2 was sought to be discredited in cross examination, however, nothing material could be extracted which would enable the court to discard his testimony.

13. It is well established that in a Claim Petition under Section 161 of the Act, negligence is required to be proved on touchstone of preponderance of probability. In view of the above, negligence was sufficiently established.

### **QUANTUM OF COMPENSATION**

14. During inquiry before the Tribunal, it was claimed that deceased Tej Prakash was employed with M/s Bar Tech Systems & Automations Pvt. Ltd., address of which was also given in the claim petition. It was further stated that he was earning a salary of Rs. 8000/- per month. Although averment with regard to the same was made by PW-1 Kedarnath in his evidence by way of Affidavit (Ex. PW1/1); at the same time no documentary evidence was produced with regard to the deceased's income. However, it was established from the unchallenged testimony of PW1 and also from host of the documents placed on record that deceased Tej Prakash was a Graduate from Rajasthan University with Economics as one of the subjects. He was not only a Graduate but he had also obtained advanced diploma in computers from the Department of Ministry of Communication & Information Technology, Government of India. He had passed O Level DOEACC Exams. He had also obtained certificate course from UP Tech titled DTP (Desktop Publication). He further obtained

advance diploma in computer application from Computer Software Ltd , Jaipur.

15. Appellant Insurance Company had not led any evidence on the basis of its investigation that the deceased was not employed with M/s Bar Tech Systems & Automations Pvt. Ltd., Mohan Garden, New Delhi. Even if the Claim Tribunal disbelieves the claimant's version that the deceased was earning Rs. 8000/- per month from the earlier said employer, it ought to have made assessment of the deceased's income on the basis of his qualifications and ought not to have given compensation merely on the basis of him being a Graduate.
16. In view of this, I am inclined to believe that the income of deceased was Rs.8000/- p.m. as claimed. At the same time, the Respondents were not entitled to addition towards future prospects in the absence of any evidence with regard to the same in view of the report of the Supreme Court in *Reshma Kumari and Ors. v. Madan Mohan and Anr.*, (2013) 9 SCC 65 and a judgment of this Court in *HDFC ERGO General Insurance Co. Ltd. v. Smt. Lalita Devi & Ors.*, MAC. APP. 189/2014 decided on 12.01.2015.
17. The mother of the deceased was aged 48 years at the time of the accident. On applying a multiplier of 13 and 1/2 deduction towards

personal and living expenses, the loss of dependency will come to Rs.6,24,000/- (8000 x 1/2 x 12 x 13).

18. In addition, in view of the three Judge Bench decision of the Supreme Court in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54, Respondents no.1 and 2 are further entitled to a sum of ₹ 1,00,000/- towards loss of love and affection, ₹25,000/- towards funeral expenses and ₹10,000/- towards loss to estate.
19. The overall compensation thus comes to Rs.7,59,000/-.
20. The compensation is therefore enhanced by Rs.2,83,000/- which shall carry interest @ 9% per annum from the date of filing of the claim petition till its payment.
21. It is true that in the present case, no Cross-Appeal or Cross-Objections have been filed by the Respondents. The question was examined by me in *Oriental Insurance Company Limited v. Mamta Rani & Ors.*, MAC APP.629/2010, decided on 06.09.2012 wherein this Court noticed the Supreme Court judgments in *Nagappa v. Gurudayal Singh*, (2003) 2 SCC 274; *Ibrahim v. Raju*, AIR 2012 SC 534; *New India Assurance Co. Ltd. v. Gopali & Ors.*, Civil Appeal No.5179 of 2012 decided on 05.07.2012 and a judgment of the learned Single Judge of this Court in *National Insurance Co. Ltd. v. Komal & Ors.*,

*MANU/DE/2870/2012*, and held that the Court can increase the compensation without filing any Cross Appeal or Cross Objections.

22. Thus, I do not find any impediment in increasing the compensation in favour of the Respondents/Claimants.
23. 80% of the enhanced compensation shall be for the benefit of Respondent no. 2, rest 20% shall be paid to Respondent no.1.
24. 50% of the enhanced compensation awarded to each of the Respondents shall be kept in fixed deposit for one year and rest shall be released on deposit.
25. The compensation deposited in pursuance of the order dated 25.05.2011 shall be released in terms of the order passed by the Claims Tribunal.
26. Enhanced compensation of Rs.2,83,000/- along with interest as indicated earlier shall be deposited by the Appellant Insurance Company in UCO Bank, Delhi High Court Branch, New Delhi within a period of 6 weeks from today, failing which Respondents no.1 and 2 shall be entitled to interest @ 12% per annum from the date of this judgment.
27. The appeal is disposed of in above terms.

28. The pending applications, if any, also stand disposed of.
29. Statutory amount, if any, deposited shall be refunded to the Appellant Insurance Company after the enhanced compensation is deposited and certificate of compliance is filed by the Insurance Company.

**(G.P. MITTAL)**  
**JUDGE**

**APRIL 10, 2015**  
**RS**