IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No.4005 of 2016
Date of Decision:27.09.2016

Kuldeep

... Appellant

Vs.

Nand Kumar and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?
3. Whether the order is speaking/reasoned?

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Present:- Mr. Naveen S. Bhardwaj, Advocate, for the appellant.

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Amol Rattan Singh, J.

This is an appeal by the driver-cum-owner of a vehicle bearing registration no.HR-61A-5855, described in the impugned Award as also in the memo of parties before the Tribunal, as a "dala".

The claim petition arose from a motor vehicle accident that took place on 16.02.2014, resulting in the unfortunate death of Mohit Kumar, son of respondents no.1 and 2 herein and brother of respondents no.3 and 4.

The 5th respondent in this appeal is the insurance company that had insured the said vehicle, owned by the appellant.

On16.02.2014, Mohit, alongwith Akash, Vishal, Bhupender, Sunil, another Bhupender, Naveen, Parvesh, Ankit and Vikas, all residents of village Lalawas, had gone to village Dwarka, to play a cricket match. On their return journey, they were all stated to have been waiting for a vehicle at about 4:00 pm, to go to village Pokharwas. The aforesaid vehicle owned by the appellant came there and all the afore-named persons boarded it. Other than the appellant, two other persons were already stated to have been sitting in the vehicle.

As stated in the claim petition (the facts being taken presently from the impugned Award), the vehicle was being driven in a rash and negligent manner at a high speed, with the occupants having requested the driver to slow down, but with no result.

Near a canal minor, the appellant allegedly took a sharp turn as a result of which the “dala” over turned, with all the occupants having sustained injuries. Mohit and Bhupender are stated to have come under the rear tyres of the “dala”. They were taken out and brought to the General Hospital, Bhiwani, where Mohit was declared dead.

An FIR was also registered at Police Station, Badhra, on 17.02.2014 and thereafter, the claim petition filed by the parents of the deceased, his sister and brother, i.e. respondents no.1 to 4.

2. It was further pleaded that deceased Mohit was 20 years old, running a hardware shop and also owned three acres of land. His income was given to be Rs.30,000/-.

Rs.25,00,000/- were claimed by way of compensation, in addition to another Rs.1,00,000/- on account of transportation charges and his last rites.

3. Upon notice having been issued in the claim petition, the present appellant (respondent no.1 before the Tribunal), filed his written statement denying the accident and further alleging that the FIR lodged against him was false and concocted and being a delayed FIR, it had been lodged after due

deliberations and consultations.

Other than denying the averments in the claim petition, preliminary objections with regard to maintainability, estoppel, locus standi and mis-joinder of parties were also taken by the present appellant, in his written statement.

4. The respondent insurance company filed a separate written statement stating that it had not received any information about the accident and that the present appellant has been falsely involved in the criminal case. It was further contended that the death of the deceased did not take place due to any accident with the vehicle described in the petition and that the petition had been actually filed in collusion with the present appellant.

Yet further, the insurance company contended that even as per the FIR, the deceased was travelling in a 'loading' vehicle as a gratuitous passenger, thereby violating the provisions of the Motor Vehicles Act.

Other objections with regard to the claim being an exaggerated one and the appellant not holding a valid and effective driving licence, were also taken by the insurance company in its reply, other than the usual preliminary objections.

5. Upon the aforesaid pleadings, the Tribunal framed the following issues:-

> "1. Whether the accident causing death of Mohit Kumar took place on 16.2.2014 due to rash and negligent driving of Dala bearing no.HR-61A-5855 by respondent no.1, as alleged? OPP
>
> 2. If issue no.1 is proved, whether the claimants are entitled for compensation, if so, to what amount and from whom? OPP
>
> 3. Whether respondent no.1 was not having a valid and effective driving licence at the time of accident, if so its

effect? OPR-2

4. Relief.”

6. The claimants (respondents no.1 to 4 herein) examined the first claimant, Nand Kumar, and Akash, one of the co-passengers, as an eye witness, who had also got FIR registered.

By way of documentary evidence, copies of the post mortem report, death certificate, FIR and charge sheet issued against the appellant were exhibited by the claimants, further placing on record a copy of the matriculation certificate of the deceased, as also a ration-card, as Marks B & C respectively.

The present appellant placed a copy of his driving licence and insurance policy on record, as Marks R1 and R2 respectively.

The insurance company examined a Junior Clerk of the office of the Regional Transport Authority, Agra, and one of its Assistant Managers (Legal), as two witnesses. The company also tendered by way of evidence, the same two documents, i.e. the driving licence of the appellant and a copy of the insurance policy, as Exs.R1 and R2 respectively.

7. Upon appraising the aforesaid evidence and the pleadings, the learned Tribunal found that the testimony of the eye witness, Akash, read with FIR, the post mortem report, the charge sheet against the appellant, and the death certificate of deceased Mohit Kumar, conclusively established that his death had taken place due to the accident that took place on 16.02.2014, with the present appellant being guilty of rash and negligent driving of the vehicle in question.

The testimony of the eye witness not having been rebutted by the present appellant by way of even examining himself, the issue of negligence was finally held to be against the appellant.

8. As regards the quantum of compensation, no evidence having been led that the deceased was running a hardware shop and owning three acres of land from both of which he was earning Rs.30,000/- per month, it was found that he was actually a student of Class-11 at the time of the accident and consequently, his income was assessed to be Rs.4800/- per month. Further, since the deceased was stated to be 19 years old, 50% of the assessed income was added towards the loss of prospects of future income, by citing the judgment of **Smt. Sarla Verma and others vs. Delhi Transport Corporation and another** (2009) 6 SCC 121. Consequently, his monthly income was assessed to be Rs.7200/-.

Finding that claimants no.3 and 4 (present respondents no.3 and 4) were not dependent upon the deceased being the parents of a student, a 50% deduction was applied to the assessed income, and consequently, the annual dependency of respondents no.1 and 2 was calculated to be Rs.43,200/- (Rs.3600/- x 12).

The deceased having been proved to be 19 years old, with his date of birth being 26.11.1995, as per his matriculation certificate, a multiplier of 18 was applied, with the contention of the respondents that it should actually be the age of the parents that can be taken into consideration for that purpose, having been rejected by the Tribunal on the touchstone of the judgment in **Amrit Bhanu Shali and others v. National Insurance Company Limited and others** (2012(4) RCR (Civil) 343.

Thus, as regards loss of income, Rs.7,77,600/- was assessed by way of compensation, to which funeral expenses of Rs.25,000/- were added.

Therefore, the total compensation awarded by the Tribunal to the respondents-claimants was Rs.8,02,600/-, upon which they were also held entitled to interest @ 6% per annum, running from the date of the institution of the claim petition, till realisation of the awarded amount.

9. As regards the liability of the two respondents before the Tribunal, i.e. the present appellant and the insurance company that had insured his vehicle (respondent no.5 herein), it was found that the policy was in respect of a commercial vehicle, though a package policy. From the cross-examination of PW2 Akash, it was found that 8 to 10 persons were travelling in the vehicle and they had actually settled the fare with the driver, which was to be paid after reaching the destination but before that, the accident had taken place.

Hence, it was held that the deceased being neither the owner nor a representative of the owner of any goods being carried in the vehicle, he was travelling as a gratuitous passenger and the insurance company was, therefore, not liable to pay the compensation. A judgment of the hon'ble Supreme Court in **National Insurance Company Limited v. Cholleti Bharatamma & ors.** 2008 (1) LJR 588, was referred to in this regard.

As such, the compensation amount of Rs.8,02,600/-, alongwith the interest accruing thereupon, was held to be payable by respondent no.1 only.

10. The appellant, therefore, is in appeal before this Court.

Learned counsel for the appellant submitted that on the issue of negligent driving, out of the 12 persons stated to be travelling in the truck, only one testified against the appellant, and that witness was the brother of the deceased. He, therefore, submitted that the testimony could not be believed and as such, both, the issue of negligence as also the liability of the appellant to pay the compensation, have been both erroneously decided by the Tribunal, with even the compensation amount erroneously calculated, with the deceased only being a student of class 11, not proved to have been earning anything.

11. Having considered the aforesaid arguments, I find myself unable to accept the same, on all three counts.

As regards the issue of negligence, with the passengers, including the deceased, all travelling in the vehicle, and the vehicle having over turned due to the over speeding of the appellant, as per the eye witness, with no other vehicle involved, I see no reason to reverse the finding given on that issue. With the present appellant not even having stepped into the witness box to rebut the testimony of the eye witness, which was also incorporated in the FIR, as found by the Tribunal, simply because the eye witness was a brother or relative of the deceased (he not being one of the claimants), I see absolutely no reason to discard his testimony. Of course, had the appellant examined himself to give a different acceptable version of the accident, the matter may have been different. But with that not having happened, and with no other vehicle involved at all, I see no error in the finding of the Tribunal that it was the negligence of the appellant that had caused the accident.

12. Coming to the issue of an allegedly excessive compensation, undoubtedly, the deceased was found to be a student of Class 11, even though he was 19 years old. It has been held by the hon'ble Supreme Court in numerous decisions by now, including **Kishan Gopal and another v. Lala and others** (2014) 1 SCC 244, that a notional income at least has to be assessed even in the case of a child, because obviously after his/her studies are over, he/she would be engaged in some vocation/profession to earn his/her

living. The deceased, being 19 years old, was not a child but nevertheless a student and very much capable of earning, upon completion of his studies.

However, even with him not having been shown to be a student of any technical course or a professional degree course, the Tribunal has, in fact, in the opinion of this Court, assessed the income of the deceased less than it should have, inasmuch as, the deceased being 19 years old, even if he was a student, the minimum wage notified by the Haryana Government for an unskilled worker on 01.01.1994 was Rs.5547.10/- per month. Thus, actually that should have been the assessed income of the deceased; however, this not being an appeal of the claimants, nothing further is said in that regard but the income of Rs.4800/- per month assessed, is not found to be excessive.

As regards the loss of future prospects of an increased income, though otherwise the appellant may have a valid argument presently at least, in view of the fact that the issue of granting of such loss of income in the case of a person who was not an employee on a permanent basis, is under consideration of a larger Bench of the Supreme Court, however, it is seen that the Tribunal granted no compensation whatsoever to the respondents-claimants for the loss of love and affection of their son/brother. For the loss of a 19 year old youth, normally this Court would award Rs.1,00,000/- to each of the parents and at least Rs.25,000/- to Rs.50,000/- each, to the siblings, dependent upon the age of the siblings.

Thus, to a minor sister, this Court would award Rs.50,000/- if this had been an appeal of the claimants and at least Rs.25,000/- to the adult brother of the deceased.

If the above compensation amounts were to be factored in, as were awardable to the claimants, less the amount awarded for loss of future prospects of income, the compensation awardable would be as is given hereinafter.

13. The income assessed, of the deceased, being Rs.4800/-, 50% thereof, the deceased being a bachelor, would come to Rs.2400/- per month or Rs.28,800/- per annum. To that, in terms of the judgment in *Amrit Bhanu Shalis'* case (supra), a multiplier of 18 is to be applied, thereby coming to a loss of income of Rs.5,18,400/- to the claimants.

Rs.25,000/- already having been awarded by the Tribunal towards funeral and transportation charges, the total amount awardable under these two heads, would come to Rs.5,43,400/-.

If Rs.2,00,000/- was to be awarded to respondents no.1 and 2 for the loss of love and affection of their son and even Rs.35,000/- each to respondents no.3 and 4, i.e. the sister and brother of the deceased, the total compensation awardable would come to Rs.8,13,400/-.

The Tribunal, on the other hand, even though not factoring in any compensation for the loss of love and affection of the deceased, to his parents and siblings, but having awarded respondents no.1 and 2 herein also for the loss of future prospects of an increased income of their son, eventually awarded a total sum of Rs.8,02,600/-.

Thus, if the compensation to be awarded on account of loss of love and affection, is offset against what was awarded by the Tribunal by way of loss of future prospects of an increased income, even then the total compensation would come to Rs.10,800/- more than what was awarded by the Tribunal. This is not taking into account the fact that if eventually it is held by the Supreme Court in **National Insurance Company Limited v. Pushpa and others** (2015) 9 SCC 166 (larger Bench), that loss of future prospects of an increased income are also to be awarded to the claimants where the deceased was not in permanent employment, even due to an increased cost of living in the future, the compensation awarded by the Tribunal in the present case would be actually far less than was actually awardable.

However, as already said, the claimants not being in appeal, this Court need not go into that aspect at all, except to hold that the compensation awarded by the Tribunal, even if taken to have been awarded under different heads, there would be no cause for reduction of the compensation awarded.

14. Coming lastly to the issue of the liability of the respondent insurance company, as contended on behalf of the appellant.

Though learned counsel has argued that there was no evidence other than the testimony of PW2 (stated to be brother of the deceased), to show that the deceased was travelling as a gratuitous passenger alongwith 11-12 other persons, I find the argument wholly untenable.

It has not been shown that the vehicle in question was not a goods carrying vehicle. It also not shown that the deceased, was either the owner of the goods or accompanying them as a care taker or was in the employment of the appellant, who was the driver and owner of the "offending vehicle". That being so, the appellant himself being the owner of the vehicle, having allowed the deceased to travel in a goods vehicle, he has no one but himself to blame. The learned Tribunal rightly cited the judgment in *Cholleti Bharatammas'* case (supra) to hold that where a gratuitous passenger is being carried in a goods carriage vehicle, it would amount to a breach of the conditions of the insurance policy, thereby absolving the insurance company of liability to indemnify the insured.

Of course, though evidence was led to the effect that some amount had been settled by the deceased and his co-passengers to be paid to the appellant upon reaching the destination, therefore, he may not have been a wholly gratuitous passenger. However, firstly, though the amount was not paid, but was agreed to be paid, it is still not denied that the vehicle in question was not a vehicle for carrying passengers. The appellant having allowed the deceased and his co-passengers to travel in the back of the goods carriage, I see no ground to foist the insurance company with any liability, and as such to interfere with the finding of the Tribunal in that regard.

Further, as regards the testimony of PW2, Akash, having been assailed to the effect that so many passengers were not travelling in the vehicle as he had testified to, firstly, this appeal arises out of a claim petition filed by the next of kin of only one passenger, and equally importantly, the appellant never having refuted the testimony of the aforesaid witness, as already said, by stepping into the witness box himself, it does not lie in his mouth to raise such a plea at this stage.

15. Consequently, finding no merit in this appeal, it is dismissed *in limine,* with no order as to costs.

C.M. No.13743-CII of 2016

16. In view of the fact that the appeal has been dismissed *in limine,* the issue of condonation of the delay of 383 days in filing the appeal is rendered academic and is not gone into.

(AMOL RATTAN SINGH)
JUDGE

September 27, 2016
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