IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.752 of 2012

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Oriental Insurance Co. Ltd., Regiional Office, Pimuhani, Patna-3/And Opp. Party No. 3 In The Claim Case.

.... Appellant/s

Versus

1. Nirmala Kumari Sinha @ Nimala Devi (Claimant No. 1 In The Claim Case) W/O Deceased Brajesh Kumar Resident Of Karauta, P.S. Bhakhtiarpur, District Patna.
2. Govind Raj (Claimant No. 2) Minor S/O Deceased Brajesh Kumar Resident Of Karauta, P.S. Bhakhtiarpur, District Patna.
3. Gopi Raj (Claimant No. 3) Minor D/O Deceased Brajesh Kumar Resident Of Karauta, P.S. Bhakhtiarpur, District Patna.
4. Ram Kishore Sharma (Claimant No. 4) F/O Deceased Brajesh Kumar Resident Of Karauta, P.S. Bhakhtiarpur, District Patna.
5. Meena Devi (Claimant No. 5) W/O Ram Kishore Sharma , Mother Of Deceased Brajesh Kumar Resident Of Karauta, P.S. Bhakhtiarpur, District Patna.
6. Ashok Kumar (Opp. Party No. 1 In Claim Case) Driver Of Truck No. Jh-12a-9062 S/O Ganga Singh Resident Of Didarganj, P.S. Malasalami, Patna City, District Patna.
7. Shailesh Jain (Opp. Party No. 2 In Claim Case) Owner Of Truck No. Jh-12a-9062 S/O Suresh Jain Resident Of Ranchi Patna Road Samant Petrol Pump, Jhumri Tilaiya, Kodarma (Jharkhand)

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Arun Kumar Srivasatava, Adv

For the Respondent/s : Mr. Alok Kumar, Adv

Mr. Shambhu Sharan, Adv

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date: 13-07-2017

This is an appeal by the Insurance Company namely the Oriental Insurance Company challenging the judgment dated 23rd January, 2012 passed by the Additional District Judge,VI-cum- Motor Vehicle Accident Claims Tribunal, Patna in Claim Case No. 448 of 2008 and the award passed thereon on 27.07.2012.

The accident in question arose when the deceased Brajesh Kumar, husband of claimant No 1 Nirmala Kumari Sinha, his minor children and parents raised the claim due to his death which occurred on 11.11.2007 when the motorcycle in which he was riding, dashed with a truck bearing No JH-12A-9062, insured with the appellant Insurance Company. The learned Tribunal has awarded a total compensation of Rs. 11,87,360/- and appellant herein, the Oriental Insurance Company, insurer of the vehicle i.e. the truck, has been held liable. The only ground on which the appeal has been filed is that the accident arose on account of rash and negligent driving of the deceased Brajesh Kumar who was riding the motorcycle which was ensured with a particular Insurance Company and in spite of objections raised with regard to non-joinder of party contributory negligence, the learned Tribunal ignored all these aspects of the matter and proceeded with the trial and awarded the compensation holding the Insurance Company liable without adverting to consider the question of contributory negligence on the effect of the insurer, the insurer of the motorcycle not being imploded as party.

Learned counsel for the appellant Insurance Company invites my attention to the written statement filed by the appellant Insurance Company before the Tribunal. In para 3, 4, 5 and 7 thereof, specific pleas had been made with regard to non-joinder of part the contributory negligence and the fact that deceased himself was driving the motorcycle in a rash and negligent manner which resulted into the accident. He also invites my attention to the application filed proposing the issues and the proposals made for framing an issue pertaining to contributory negligence which has been completely ignored by the learned Trial Court. That apart, he further invites my attention to an application filed under Section 169 of the Motor Vehicles Act to claim that in spite of summoning documents with regard to insurance of the motorcycle, the learned Court ignored all these aspects.

Accordingly, learned counsel for the Insurance Company submits that as the question of contributory negligence of the insurer of the motor cycle which was being driven by the deceased has been totally overlooked, the award is perverse, illegal and unsustainable. Even though, learned counsel for the claimants vehemently opposed the aforesaid prayer and argued that appellant Insurance Company did not lead any evidence in support of the aforesaid contention of contributory negligence.

I am of the considered view that at this stage, in passing of the judgment and award and holding the Insurance Company being liable without framing the issue and calling an enquiry with regard to rash and negligent driving and plea of contributory negligence, an error has been committed and this aspect warrants consideration. That apart, it has been taken note of that challenging the same award and claiming enhancement of compensation, the claimants have also filed an appeal before this Court being M.A. No. 807 of 2012 and by a detailed order passed by a coordinate Bench of this Court on 28.06.2016, the matter has been remanded back to the Trial Court for reconsideration of the question of assumption of compensation and in that view of the matter, it is clear that the question is not sub-judice before the Tribunal for considering the question of enhancement of compensation. Be that as it may be, on going through the original records, it is seen that the accident took place when the motorcycle driven by the deceased dashed with the truck in question on a national highway during the day time and in the written statement filed by the Insurance Company namely the appellant herein, from para 3 onwards, specific averments had been made with regard to non-joinder of the necessary party namely the insurer of the motorcycle and in para 6 and 7 particularly in para 7, averments have been made with regard to contributory negligence due to the rash and negligent driving by the deceased who is said to have been driving the motorcycle in a rash and negligent manner. That apart, when the issues were being framed, specific issue was proposed by the appellant Insurance Company to frame an issue on the question of contributory negligence of the driver of the motorcycle namely the deceased herein and application was also filed for summoning the documents with regard to insurance of the vehicle. All these aspects of the matter pertains to an issue having bearing on the question of accident was totally overlooked and the Tribunal proceeded to determine the issue without considering the question of contributory negligence pleaded by the appellant Insurance Company. Once the appellant Insurance Company had pleaded and come out with a case of contributory negligence and had specifically raised the ground in the written statement and has also proposed the issue in this regard, the Tribunal committed a procedural irregularly in proceeding with the trial without framing of the issue and considering this aspect of the matter.

That being so, as the matter has already been remanded back to the Tribunal as is evident from the order dated 28.06.2016 passed in M.A. Case No. 807 of 2012 finding the question of contributory negligence raised by the appellant Insurance Company having not been decided in the award in question, the matter is also remanded back for consideration of this aspect of the matter. Learned Tribunal shall frame additional issue with regard to plea of contributory negligence, permit pleadings of the Insurance Company of the motorcycle and proceed to decide the issue, in accordance with law.

The amount of Rs. 25,000/- deposited by the insurance company be transmitted to the Trial Court.

The Lower Court Records be also returned forthwith for concussion of the trial.

(Rajendra Menon, CJ)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	18/07/2017
Transmission Date	NA