**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision: 2.8.2017

1. **FAO No. 4537 of 2012(O&M) &
XOBJC No.132-CII of 2014**

ICICI Lombard General Ins. Co. Ltd. ….Appellant

VERSUS

Krishna Devi and others .....Respondents

Present: Ms. Vandana Malhotra, Advocate for the appellant.

Mr. S.S. Shekhawat, Advocate for respondents No.1 and 2/cross objectors.

None for respondents No.4 and 5.

Mr. K.S. Malik, Advocate for respondent No.7.

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2. **FAO No. 6394 of 2012(O&M)**

Mamta ….Appellant

VERSUS

Krishna Devi and others .....Respondents

Present: Mr. K.S. Malik, Advocate for the appellant.

Mr. S.S. Shekhawat, Advocate for respondents No.1 and 2.

None for respondent No.5.

Ms. Vandana Malhotra, Advocate for respondent No.7.

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CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

REKHA MITTAL, J.

This order will dispose of FAO Nos.4537 and 6394 of 2012 and cross objections No.132-CII of 2014 as these have emerged out of the same award dated 07.05.2012 passed by the Motor Accidents Claims Tribunal, Rohtak (in short 'the Tribunal') whereby compensation has been awarded in regard to death of Rakesh Kumar in a motor vehicular accident that took place on 31.01.2009.

FAO No.4537 of 2012

The Tribunal, while deciding the issue of negligence of vehicle No.HR-63-4787 has held that driver of the aforesaid vehicle and deceased Rakesh Kumar driver of car bearing No.DL-5CD-8204 contributed equally, therefore, insurer of trolla No.HR-63-4787 shall be liable to pay compensation to the extent of 50% and the remaining 50% shall be the joint and several liability of owner and insurer of car driven by Rakesh Kumar.

The ICICI Lombard General Insurance Company Ltd. has preferred the appeal to challenge the findings of the Tribunal whereby 50% liability qua negligence attributed to the deceased driver has been fastened upon the insurance company of the car.

Mamta, widow of the deceased has filed the appeal, FAO No.6394 of 2012 seeking enhancement of compensation assessed by the Tribunal. Similarly, parents of the deceased have filed their cross objections for enhancement of compensation.

The Tribunal assessed income of the deceased at Rs.10,000/- per month, deducted 1/3rd for personal expenses, applied a multiplier of 18 to compute loss of dependency at Rs.14,47,000/-. In addition, an amount of Rs.10,000/- towards loss of consortium and Rs.5,000/- for funeral expenses has been awarded making total compensation to Rs.14,62,000/- to be shared equally by the parents and widow of the deceased.

For the sake of convenience, ICICI Lombard General Insurance Co. Ltd. would be referred to as 'Insurance Company' whereas the widow and cross objectors would be referred as 'claimants'.

Counsel for the Insurance Company has challenged findings of the Tribunal holding the deceased to have contributed to the accident much less to the extent of 50%. For this purpose, she has invited attention of the Court to testimony of Ashok Kumar PW-2, an eye-witness to the occurrence. It is argued that as the deceased could not notice trolla bearing No.HR63-4787 being parked on the road due to light of the vehicles coming from opposite direction, no such finding can possibly be recorded in the given circumstances that the deceased, in any manner, was guilty of not taking care for his own safety, in order to attribute any blame to him or to say that he himself was a wrongdoer to any extent whatever. For this purpose, she has made reference to judgments of Hon'ble the Supreme Court **Municipal Corporation of Greater Bombay Vs. Shri Laxman Iyer and another, 2003 (4) RCR (Civil) 764**, **Raj Rani Vs. Oriental Insurance Company Ltd., 2009 (13) SCC 654**.

Counsel representing the claimants has endorsed the arguments advanced by counsel for the Insurance Company to assail the findings of the Tribunal on issue No.1 attributing contributory negligence to the deceased.

To substantiate their contention for enhancement of compensation, counsel would urge that the deceased was MBA and engaged in business of Contractorship in Jharli Power Plant and earning Rs.40,000/- per month, therefore, income of the deceased is liable to be enhanced. The Tribunal has not allowed benefit of increase in income for future prospects to the extent of 50%. It is further argued that the claimants are entitled to compensation under conventional heads in the light of judgments of Hon'ble the Supreme Court **Rajesh and others Vs. Rajbir Singh and others, 2013 (3) RCR (Civil) 170** and **Vimal Kanwar and others Vs. Kishore Dan and others, 2013 (2) RCR (Civil) 945**.

There is no representation on behalf of National Insurance Company Ltd. with whom trolla bearing No.HR-63-4787, the alleged offending vehicle was insured. However, counsel representing the insurance company has supported assessment of compensation by the Tribunal.

I have heard counsel for the parties, perused the paper-book and the records.

There is no challenge to findings of the Tribunal that trolla bearing No.HR-63-4787 was parked on left side of the road without any indicator or blinkers. The accident in question took place at 10:30 PM on 31.01.2009. The car driven by Rakesh Kumar struck the stationary trolla from behind. No evidence has been adduced by the driver, owner or insurer of trolla to rebut the statement of Ashok Kumar PW-2.

The question for consideration is whether findings of the Tribunal attributing contributory negligence of 50% to Rakesh Kumar (since deceased) suffer from any error warranting intervention.

To determine this issue, we have to examine testimony of Ashok Kumar PW-2 who has stated himself to be a passenger in the ill-fated car at the time of occurrence. Ashok Kumar tendered into evidence his affidavit Ex.PW2/A and copy of FIR Ex.P2. A relevant extract from his testimony reads as follows:-

> "That 31.01.2009, the deponent along with Rakesh Kumar since deceased was coming from Jarli, District Jhajjar to Rohtak in a Swift Car No.DL-5CD-8204. Rakesh Kumar was driving the said Car at a normal speed. Near about 10.30 P.M. when they reached 2 KM from Dighal towards Rohtak side on Rohtak-Jhajjar Road, on its correct side of the road, a Vehicle Tralla No.HR-63-4787 was standing on the road without following the traffic rules and without any indication and back light on and due to the light of other vehicles which were coming from the opposite side Rakesh Kumar since deceased did not see the above said Vehicle No.HR-63-4787 and struck his car in said vehicle No.HR-63-4787."

In his cross examination, he has denied that car was driven by its driver in a rash and negligent manner or accident had taken place due to his own fault. There is no challenge to testimony of Ashok Kumar that the trolla was parked on left side of the road without any indicator or light. As per deposition of the witness, car was being driven at a normal speed of about 40-50 KMs per hour. There is nothing in the statement of Ashok Kumar that the deceased used dipper and high beam light in continuous succession to ensure if any vehicle was going ahead of him or there was any obstruction on the road. Further more, as per statement of Ashok, the deceased was driving at a speed of 40-50 KMs per hour and had he taken reasonable care, he could apply brakes after noticing a vehicle being parked on the road. There is no material on record that the deceased applied any brakes or any skid marks of tyres of the car were noticed by the police during investigation. Under the circumstances, it is difficult to accept contention of the claimants that the present is not a case of contributory negligence or no negligence whatever can be attributed to the deceased. The mere fact that driver of the trolla did not appear in the witness box is not sufficient to set aside findings of the Tribunal with regard to contributory negligence.

Another question that invites consideration is whether extent of negligence attributed to the deceased by the Tribunal can be affirmed or otherwise. Taking a clue from the judgments cited by counsel for the insurance company though facts of the referred authorities are not very clear when examined in the light of facts and circumstances of the present case, in the fitness of things, $1/3^{rd}$ in place of 50% negligence is attributed to Rakesh Kumar (deceased).

With these observations, findings recorded by the Tribunal on issue No.1 are modified in the aforesaid terms.

The Tribunal has held insurance company of car No.DL-5CD-8204 liable to pay compensation to the extent of 50%, negligence attributed to the deceased. As per the settled position in law, a wrongdoer cannot take advantage of his own wrong. That being so, owner and insurer of car driven by Rakesh Kumar cannot be fastened with liability to pay any compensation.

FAO No.6394 of 2012

The claimants have asserted that the deceased was earlier working as Executive in India Com Limited, Gurgaon in the year 2006 and then Senior Sales Executive in You Telecom Pvt. Ltd., Mumbai in March 2007 and thereafter marketing Executive in Nucleus Marketing & Communication, New Delhi and his income was approximately Rs.15,000/- per month. Another plea raised by the claimants is that after leaving job, Rakesh started business as a Sub Contractor at Jharli Powerplant Jhajjar and was earning Rs.40,000/- per month. Mamta and Om Parkash, widow and father respectively of the deceased appeared in the witness box to establish their claim in regard to income of the deceased. They brought on record certificate Ex.P8 purported to be issued by You Telecom India Pvt. Ltd with regard to salary of the deceased to be Rs.10,687/- per month and document Ex.P9 by Nucleus Marketing & Communication qua salary of deceased at Rs.10,5,11/- for the month of December 2007.

The claimants did not examine any representative from the concerned companies to prove the salary certificates on the basis of records, if any, maintained by the companies. They did not examine any witness from Jharli Power Plant to prove that the deceased was working as a Contractor much less earning Rs.40,000/- per month. As such, the claimants have failed to adduce cogent and convincing evidence with regard to earning of the deceased at the time of death. However, it has not been disputed that the deceased was M.B.A. (Administration) from Maharshi Dayanand University, Rohtak. Taking a clue from the minimum wage fixed by the State of Haryana for a highly skilled worker coupled with the educational qualification of the deceased, income of the deceased at Rs.10,000/- per month assessed by the Tribunal is affirmed. However, the claimants shall be entitled to increase in income for future prospects to the extent of 50% as the deceased was 24 years old. The mere fact that the matter with regard to future prospects is pending consideration before a Larger Bench of Hon'ble the Supreme Court in view of reference made in **National Insurance Company Ltd. vs. Pushpa, SLP (C) No.16735 of 2014, decided on 02.07.2014** is not sufficient to deny the said benefit till the judgment in **Rajesh and others Vs. Rajbir Singh and others, 2013 (3) RCR (Civil) 170** is varied or set aside. The Tribunal has rightly allowed deduction to the extent of 1/3rd and applied a multiplier of 18. In this manner, loss of dependency comes to Rs.21,60,000/- [Rs.32,40,000/- (Rs.15,000/- x 12 x 18) - Rs.10,80,000/- (1/3rd towards personal expenses)].

Under conventional heads, claimants shall be entitled for following compensation:-

1. Loss of consortium to the widow	Rs.1,00,000/-
2. Expenses on funeral	Rs.25,000/-
3. Loss of love and affection to mother	Rs.50,000/-
4. Loss of estate	Rs.25,000/-

In view of the above, total compensation is Rs.23,60,000/- and the claimants are entitled to 2/3rd thereof i.e. Rs.15,73,333/- (rounded off to Rs.15,73,330/-) payable by the driver, owner and insurer of vehicle No.HR-63-4787, with interest at the rate of 7.5% per annum from the date of petition till realisation. However, the amount shall be shared equally by two sets of claimants except amount of consortium payable exclusively to the widow and loss of love and affection to the mother. It is clarified that the owner and insurer of car No.DL-5CD-8204 shall not be liable to pay any compensation.

With the aforesaid observations, the appeals and cross objections stand disposed of in the terms indicated above.

AUGUST 2, 2017 **(REKHA MITTAL)**
'D. Gulati' **JUDGE**

Whether speaking/reasoned : yes/no
Whether reportable : yes/no