

However, the claimants have been held entitled to a sum of Rs.5,19,340/- as 50% negligence has been attributed to the deceased, in view of findings on issue No.1.

Counsel for the appellants has assailed findings of the Tribunal attributing negligence to the deceased and that too to the extent of 50%. It is argued that Manoj Kumar PW2, pillion rider on the motorcycle bearing No.HR-26R-4836, driven by Sandeep Kumar (since deceased) was examined and he has supported cause of the claimants that accident is the result of sole negligence of Vikas Kumar, driver of Aactiva No.HR-34G-5254. It is further argued that no such plea has been raised by Vikas Kumar that the present is a case of contributory negligence who on the contrary altogether denied the occurrence. Vikas Kumar did not appear in the witness box to counter case of the claimants and testimony of Manoj Kumar, therefore, an adverse inference is liable to be drawn against the respondents. The last submission made by counsel is that on the basis of FIR lodged at the behest of Manoj Kumar, Vikas Kumar was put to trial for committing offence punishable under Sections 279, 337 and 304-A IPC and eventually Vikas Kumar has been convicted for the offences charged against him. In addition, it is argued that findings of the Tribunal based upon the site plan marked as Ex.C1 in the criminal trial, cannot be allowed to sustain for the reason that site plan has not been proved, in accordance with law, with an opportunity to the claimants to challenge correctness thereof when otherwise the site plan is prepared on the basis of scene after

the occurrence.

Counsel representing the insurance company has supported findings of the Tribunal on issue No.1 but with the submission that compensation assessed by the Tribunal may be corrected to bring it in conformity with the judgment passed by Hon'ble the Supreme Court **National Insurance Company Limited Vs. Pranay Sethi and Ors., 2017 SCC 1270.**

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

The claimants, in para 24 of the application for compensation, has briefly narrated cause of the occurrence. It is averred that when motorcycle driven by Sandeep Kumar reached near Government College, Mahendergarh on Narnaul road, from the opposite side Activa No.HR-34-G-5254 driven by respondent No.1 at a fast speed, rashly and negligently came and directly hit the motorcycle. Sandeep Kumar and his brother Manoj Kumar fell down on the road and Activa also fell down on the road. Sandeep Kumar received serious and fatal injuries in the accident.

Vikas Kumar respondent No.1 filed reply to the claim application and in response to para 24, it has been alleged that para 24 of the petition is wrong hence denied. False and incorrect facts have been stated in this para to extract compensation. A false case is registered against the alleged Honda Activa Scooty. A conjoint reading of the averments raised in para 24 of the claim application and reply thereto by respondent

No.1 makes it evident that there is no specific denial to plea of the claimants that accident took place when the offending vehicle driven at a fast speed, in rash and negligent manner came from the opposite direction and struck against the motorcycle driven by Sandeep Kumar on which Manoj Kumar was a pillion rider. Non-specific denial of material averments amounts to admission of the contesting party.

Manoj Kumar, an eye-witness to the occurrence and author of FIR appeared in the witness box to substantiate plea of the claimants. He tendered into evidence his duly sworn affidavit Ex.PW2/A and reiterated version of the claimants with an additional fact that Activa struck against the motorcycle having been brought on the wrong side. Counsel for the insurance company has not pointed out any tangible facts elicited in cross examination of Manoj Kumar to discard or disbelieve his testimony. Manoj Kumar has reiterated in his cross examination that Activa came from Narnaul side and struck against their motorcycle coming from the wrong side. He was suggested that he had not seen the accident and no such accident had taken place with Activa in question and the same has been falsely involved in collusion with the police. As has been rightly argued by counsel for the claimants, respondent No.1 has altogether denied the accident and did not raise a plea that the present is a case of contributory negligence of both the vehicles involved in the occurrence. Not only this, Vikas Kumar did not appear in the witness box to counter case of the claimants and testimony of Manoj Kumar. An adverse inference is liable to

be drawn for his failure to appear in the witness box without any tangible explanation.

The Tribunal has relied upon the site plan marked as Ex.C1 in the criminal proceedings to attribute contributory negligence to the deceased. Perusal of the award would reveal that rough site plan was requisitioned by the Tribunal through e-mail from the case file bearing FIR No.397 dated 26.07.2014 pending in the trial Court which is Ex.C1. This site plan was neither proved on record by examining a witness with an opportunity to the claimants to challenge correctness thereof nor it was put to Manoj Kumar to seek his explanation with regard to the facts depicted in the site plan Ex.C1. It is surprising that the Tribunal has relied upon site plan Ex.C1 without appreciating that the claimants did not get an opportunity to challenge correctness thereof. The manner in which the Tribunal has proceeded to attribute contributory negligence to the deceased by relying upon site plan marked Ex.C1 in criminal proceedings, is totally unwarranted and unknown to law. In this view of the matter, findings of the Tribunal attributing contributory negligence to the deceased cannot be allowed to sustain and accordingly set aside. As a consequence, issue No.1 is answered in favour of the claimants and against respondent No.1 to the effect that accident took place because of rash and negligent driving of offending vehicle by respondent Vikas Kumar.

This brings the Court to quantum of compensation assessed by the Tribunal. The Tribunal has allowed benefit of addition in income for

future prospects @ 50% as against 40% admissible in the light of judgment of Hon'ble the Supreme Court **Pranay Sethi and others's case (supra)**. Income of the deceased, deduction for personal expenses and multiplier applied by the Tribunal are correct and affirmed. In this manner, loss of dependency comes to Rs.8,52,768/- [(Rs.5640 x 12 x 18) + (40% future prospects) – (50% deduction for personal expenses)].

Under conventional heads, the Tribunal has awarded a sum of Rs.1,25,000/-, detailed hereinbefore. The Tribunal has even allowed a sum of Rs.1 lakh for loss of consortium with regard to death of an unmarried person. It appears that the Tribunal is not aware that loss of consortium is available only to spouse of the deceased for loss of company, marital bliss and care etc. In the light of **Pranay Sethi and others's case (supra)**, claimants shall be entitled to Rs.30,000/- i.e. Rs.15,000/- for loss of estate and Rs.15,000/- for funeral expenses.

Total compensation is Rs.8,82,768/- and the additional amount is Rs.3,63,428/- (8,82,768 – 5,19,340), payable with interest @ 7.5% per annum from the date of petition till realization, to mother of the deceased.

The appeal is partly allowed in the aforesaid terms.

05.09.2018

ashok

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:

Yes / No

Whether reportable:

Yes / No