IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No.122

FAO-580-2021 (O&M)
Date of decision: 28.07.2021

United India Insurance Company Limited ....Appellant

Versus

Nisha and others ....Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Ashwani Talwar, Advocate and
Mr. Varun Sharma, Advocate
for the appellant.

Mr. Ashwani Arora, Advocate
for the respondents.

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DEEPAK SIBAL, J. (Oral)

The matter has been taken up through video conferencing.

The present appeal has been preferred by the Insurance Company to challenge therein the Award dated 22.03.2021 passed by the Motor Accident Claims Tribunal, Chandigarh (for short – the Tribunal).

In the intervening night of 12/13.04.2019, Varinder Guleria (deceased) was going in his car from Una to Amb. At about 1.00 a.m., when he reached near Takrala bridge, a bus bearing registration No.HP-72-B-7878 (for short – the offending vehicle), which was coming from the opposite direction, struck against the deceased's car resulting in the deceased's death on the spot. FIR No.46 dated 13.07.2019 under Sections

279, 304-A IPC was registered at Police Station Amb against the driver of the offending vehicle. The trial in pursuance of the afore FIR remains pending.

The heirs of the deceased filed a claim under Section 166 of the Motor Vehicles Act, 1988 through which they sought compensation on account of Varinder Guleria's death in the aforesaid accident and since the deceased's car was duly insured, such claim of theirs was resisted by the appellant-Insurance Company. Both parties led their respective evidence after sifting of which the Tribunal allowed the claim petitions resulting in the issuance of directions to the appellant-Insurance Company to pay to the respondents-claimants an amount of Rs.74,25,680/-. Interest @ 6% per annum from the date of filing of the claim petition was also granted. The amount was further directed to be shared by the claimants in the ratio given in the Award.

Learned counsel for the appellant – Insurance Company submitted that the eye-witness to the accident PW-1 Surinder Paul had stated in his cross-examination that the accident was caused at 1.00 P.M. in the night when a cow suddenly came in front of the offending vehicle. That being so, the accident in question was not caused due to the rash and negligent driving of the driver of the offending vehicle and therefore, no compensation was payable or at least there was contributory negligence on the part of the deceased.

Without prejudice to the afore submission, learned counsel for the appellant further contended that since the deceased was not having any permanent employment, the claimants were not entitled to future prospects @ 50% but only 40%.

Per contra, learned counsel for the respondents-claimants submitted that the evidence on record clearly reflected that the accident which caused Varinder Guleria's death was a result of rash and negligent driving on the part of the driver of the offending vehicle; even if a cow had come in front of the offending vehicle it was for its driver to control his vehicle at that time and prevent the accident; had the driver of the offending vehicle been driving within the prescribed speed limits, on the coming of a cow in front of his vehicle, he would have been able to control his vehicle and brought it to a halt rather than causing an accident on the other side of the road and that too with such an impact that the accident caused the deceased's dead at the spot.

On the issue of the grant of future prospects @ 50%, learned counsel for the claimants, after referring to the cross-examination of PW-3 Manraj Singh and RW-1 Gurmail Singh contended that both these witnesses had stated that the deceased, at the time of his death, was serving as a Volunteer Home Guard; his services could not be terminated by the State at any time and therefore, the post held by the deceased was of permanent nature. In support of his submissions he placed reliance on the following judgments:-

1. **FAO-16121-2018 decided on 03.12.2019 – Smt. Binder and others vs. Rajesh Kumar and others;**
2. **Pushpabai Parshottam Udeshi and others vs. Ranjit Ginning and Pressing Co. Pvt. Ltd. and another, AIR 1977 SC 1735;**
3. **FAO-4906-2007 decided on 05.08.2010 – United India Insurance Company vs. Sukhiya and others**.

PW-1 Surinder Paul, who eye-witnessed the accident which caused Varinder Guleria's death, while appearing before the Tribunal, stated that on the fateful night he was driving his car behind the deceased's car; when they reached near Takrala bridge, in the area of Police Station Amb, District Una, the offending vehicle, which was being driven at a fast speed, came on to the wrong side of the road and struck the deceased's car causing his death on the spot; the accident took place due to the rash and negligent driving of the offending vehicle; the deceased was not at fault; Surinder Paul was a photographer and prior to the accident he did not know the claimants and that he further denied the suggestion that the accident did not take place due to negligence of the driver of the offending vehicle.

The eye-witness to the accident was categoric that the accident which caused the deceased's demise was caused due to the rash and negligent driving of the offending vehicle. His statement remained unrebutted during his cross-examination. In fact, the appellant-Insurance Company did not even put a suggestion to the witness with regard to the speed of the offending vehicle. The Insurance Company also did not produce the driver of the offending vehicle before the Tribunal and in the absence thereof, this Court takes adverse inference that the driver of the offending vehicle was driving rashly at the time of the accident.

The coming of a cow in front of the offending vehicle in the dead of the night by itself would not absolve the driver of the offending vehicle because if the offending vehicle was being driven within the speed limits, its driver would have certainly been able to control his vehicle and bring it to a halt, rather than swirling it to the wrong side of the road and causing the accident. Further, the powerful headlights of the offending vehicle would also be enough for him to see the cow and take remedial measures.

In **Pushpabai Parshottam Udeshi and others vs. Ranjit Ginning and Pressing Co. Pvt. Ltd. and another, AIR 1977 SC 1735,** the Supreme Court held as follows:-

> "6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus : "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on

the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care. Applying the principles stated above we have to see whether the requirements of the principle have been satisfied. There can be no dispute that the car was under the management of the company's manager and that from the facts disclosed by P. W. 1 if the driver had used proper care in the ordinary course of things the car could not have gone to the right extreme of the road, dashed against a tree and moved it a few inches away. <u>The learned counsel for the respondents submitted that the road is a very narrow road of the width of about 15 feet on either side of which were fields and that it is quite probable that cattle might have strayed into the road suddenly causing the accident. We are unable to accept the plea for in a country road with a width of about 15 feet with fields on either side ordinary care requires that the car should be driven at a speed in which it could be controlled if some stray cattle happened to come into the road. From the description of the accident given y P. W. 1 which stands unchallenged the car had proceeded to the right extremity of the road which is the wrong side and dashed against a tree uprooting it about 9 inches from the ground. The car was broken on the front side and the vehicle struck the tree so heavily that the engine of the car was displaced from its original position one foot on the back and the steering wheel and the engine of the car had receded back on the driver's side.</u> The car could not have gone to the right extremity and dashed with such violence on the tree if the driver had exercised reasonable care and caution. On the facts made out the doctrine is applicable and it is for the opponents to prove that the incident did not take place due to their negligence. This they have not even attempted to do. In the circumstances we find that the Tribunal was justified in applying the doctrine. It was submitted by the learned counsel for the respondents that as the High Court did not consider the question this point may be remitted to the High Court. We do not think it necessary to do so for the evidence on record is convincing to prove the case of rash and negligent driving set up by the claimants." (emphasis supplied)

To the same effect are the following observations made by this Court in **FAO-4906-2007 – United India Insurance Company vs. Sukhiya and others decided on 05.08.2010**:-

"4. On the issue of quantum or negligence, the learned counsel appearing for the owner states that the accident arose when a cow darted across the road suddenly and in a bid to save it, the driver turned the vehicle to one side, but it hit against a tree. It cannot be stated that a cow was negligent in any sense and the accident was clearly an example of res ipsa loquitur situation, that should place the rashness and negligence on the part of the driver, who would not successfully maneuver his vehicle from dashing against a tree. The finding relating to negligence is, therefore, properly established. Even on the question of quantum, apart from stating that they are exorbitant, there was nothing brought out before me that the awards have been passed without applying any of the legal parameters that are necessary for ascertaining the compensation." (emphasis supplied).

In the light of the above discussion on facts and the law laid down by the Supreme Court as also this Court, this Court unhesitantly holds that the accident which caused the deceased's demise was a result of rash and negligent driving by the driver of the offending vehicle with no contributory negligence on the part of the deceased.

The Supreme Court in **National Insurance Company Limited vs. Pranay Sethi and others, (2017) 16 SCC 680** held that while determining income of the deceased an addition of 50% of the actual salary to the income of the deceased towards future prospects should be paid where the deceased has a permanent job and was below the age of 40 years and that in case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. Relevant conclusions arrived at by the Supreme Court in this regard are as follows:-

> "(iii) While determining the income, an addition of 50 per cent of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30 per cent, if the age of the deceased was between 40 and 50 years. In case the deceased was between the age of 50 and 60 years, the addition should be 15 per cent. Actual salary should be read as actual salary less tax.
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> (iv) In case the deceased was self-employed or on a fixed salary, an addition 0f 40 per cent of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25 per cent where the deceased was between the age of 40 and 50 years and 10 per cent where the deceased was between the age of 50 and 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component."

PW-3 Manraj Singh, who was the Havaldar Instructor in Chandigarh Home Guard, U.T., Chandigarh, while appearing as the claimants' witness, stated before the Tribunal that the deceased was serving as a Volunteer Home Guard; he was being paid as a daily wager for the numbers of days he served; Volunteer Home Guards were not paid fixed salary and allowances; there was no record with regard to continuity of service of Volunteer Home Guards; the Department did not maintain any service book of Volunteer Home Guards and that the Volunteer Home Guards' post was non-pensionable.

RW-1 Gurmail Singh, who was the Billing Clerk in the Home Guard Department U.T., Chandigarh, deposed that at the time of his appointment the deceased's salary was Rs. 150 per day and at the time of his death he was being paid @ Rs.1101 per day.

The above depositions by the officials working in the Home Guard Department, U.T., Chandigarh, one of whom was produced by the claimants themselves, clearly reveal that the deceased, at the time of his death, did not have a permanent job and that he was being paid salary at a fixed rate of Rs.1101 per day for the days he served. That being so and because at the time of his death he was 35 years of age, in view of law laid down by the Supreme Court in **Pranany Sethi's case (supra)**, the Tribunal erred in granting future prospects @ 50%. They should have been @ 40% and it is so ordered.

Smt. Binder's case (supra) is of no help to the respondents/claimants as a perusal of the judgment shows that the decision therein was taken on its own peculiar facts and to meet the ends of justice.

In the light of the above, the impugned Award is modified only to the extent that future prospects added to the income of the deceased @ 50% are reduced to 40%.

The appeal is disposed of in the above terms.

July 28, 2021 **(DEEPAK SIBAL)**
Jyoti 1 **JUDGE**

Whether speaking/reasoned Yes/No
Whether reportable Yes/No