IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

F.M.A 1574 of 2008

With

IA No. CAN 2 of 2015 (CAN 1614 of 2015)

Mst. Rupsuna Bibi &Ors

Vs.

New India Assurance Company Limited & Ors.

For the Appellants/ Claimants :Mr. Krishanu Banik, Advocate

For the Respondent No. 1/ New India Assurance Co. Ltd. :Mr. Rajesh Singh, Advocate

For the Respondent No. 2/ Oriental Insurance Co. Ltd. :Mr. Parimal Kumar Pahari

Hearing concluded on : November 24, 2022

Judgment on : December 02, 2022

Bibhas Ranjan De, J.

1. One Sk. Samsul Haque died on account of injuries sustained in a motor accident which took place on 08/09. 02. 2002 at about 2.45 a.m. on G.T Road, near village Fagupur under PS Burdwan by the involvement of one truck bearing registration no. HR/38C-2365 and one bus bearing no. WB-41A/5952. As a result, both the drivers of the two vehicles died. This is the claim application filed by the legal heirs i.e. wife of deceased Sk. Samsul Haque and her three minor children. Deceased Sk. Samsul Haque was driver of the bus bearing registration no. WB 41A/5952. After the accident Burdwan PS Case No.25/96 of 2002 dated 09.02.2002 under Section 279/ 337/338/422 & 304A I.P.C was started. Claimants filed the application under Section 166 of the Motor Vehicles Act,1988 claiming compensation to the tune of Rs. 6,48,000/-.

2. Both the Insurance Companies i.e. New India Assurance Company Ltd. and Oriental Insurance Company Ltd. were made parties to the claim application. New India Assurance Company contested the claim application by filing a written

statement denying all contentions of the claim petition contending, inter alia, that compensation should be awarded against the vehicle no. HR 38C/2365 and the New India Assurance Company Ltd. is not liable to pay any compensation to the claimants.

3. Oriental Insurance Company also contested the claim petition by filing a written statement denying any liability whatsoever.

4. In course of trial, wife of the deceased was examined as PW-1. She stated in her evidence that owner of the bus informed her about the accident as her husband was the driver of the bus. She stated that her husband used to earn Rs. 4,500/- per month and he was 30 years at the time of death.

5. PW-2, Sk. Lal Chand was sitting in the driver's cabin at the time of accident. At that time, bus was coming from the side of Deoghar and the lorry was proceeding towards Durgapur from Burdwan with random speed. An accident took place due to rash driving of the truck bearing no. HR 38C/2365. In cross-examination on behalf of the New India Assurance Company Ltd., PW-2 stated that bus driver (deceased) did not violate any traffic rule but lorry was being driven rashly and negligently.

6. In cross-examination on behalf of Oriental Insurance Company, PW-2 stated that he lodged FIR and both the bus and the truck were in running condition and it was head on collision. He denied the suggestion that accident took place due to rash driving of the bus.

7. PW-3, owner of the bus, deposed in this case and proved the income of the deceased as driver.

8. In course of the evidence, Insurance Policies, certificate of Police Morgue, formal FIR and Post Mortem report were admitted in evidence as exhibit 1 to 4.

9. After considering the evidence Ld. Tribunal awarded total compensation of Rs. 6,24,000/- but Ld. Tribunal only asked the Oriental Insurance company Ltd. to pay the 50% of the compensation i.e. Rs. 3,12,000/- on the ground that both the vehicles were liable for the accident and New Indian Assurance Company in respect of bus no. WB-41A/5952 is not liable to pay compensation because of the accident on account of rash driving of both the vehicles (bus & truck).

10. Being aggrieved by and dissatisfied with the award, the instant appeal has been preferred by the claimants.

11. Mr. Krishanu Banik, Ld. Advocate appearing on behalf of the claimants, has tried to make this Court understand that there was no fault or negligence on the part of the driver, deceased Sk. Samsul Hawk, of the bus no. WB 41A/5952. Accordingly, Mr. Banik prayed for entire compensation along with future prospect i.e. 40% of the income and general damages of Rs. 70,000/- in support of his contention he relied on the following cases:

- ***Mohammed Siddique & anr. Vs. National Insurance Company Ltd. & Ors., ACJ 2020 (VL-1) 751.***
- ***Usha Rajkhowa and others Vs. Paramount Industries and others, 2009 ACJ 1314***
- ***United India Insurance Company Limited Vs. Smt. Anumita Paul, 1 (2015) ACC 628 (DB) (Cal)***

12. Mr. Banik has further tried to make this Court understand that the claim petition of this case did not involve any accident due to contributory negligence of the two vehicles. He relied on the evidence of eye-witness and submitted that accident took place due to rash and negligent driving on the part of the driver of the truck bearing no. HR 38C/2365.

13. Per contra, Ld. Advocate, Mr. Parimal Kumar Pahari, appearing on the behalf of the Oriental Insurance Company has contended that it was a case of contributory negligence on the part of the drivers of both the vehicles and therefore, Oriental Insurance Company is not liable to pay entire compensation. Mr. Pahari has referred to FIR (exhibit-iii) in support of his contention.

14. Let me have an attention to the observations of the Hon'ble Supreme Court and High Court in interpreting contributory negligence in terms of respective case.

15. In ***Mohammed Siddique*** (supra) Hon'ble Apex Court dealt with a case of accident between Motor Cycle and Car. In that case, Hon'ble High Court observed contributory negligence on the part of the Motor Cycle, on the ground, that said motor cycle was changing lane to allow another vehicle to overtake, besides there were two persons on the pillion. In that case, the car hit the bicycle from behind and Hon'ble Supreme Court bifurcated the liability of the motor cycle under Section

128 of the Motor vehicles Act, 1988 for carrying two pillion riders and came to a finding that the case was not within the purview of contributory negligence.

16. ***Usha Rajkhowa*** (supra) dealt with head on collision between a truck and a Maruti Car and entire evidence focused on the evidence of PW-3, who asserted specifically that the truck was coming from the opposite direction in a high speed from Jorhat side and it hit the car, as a result of which, two persons sitting in the car died and claimant received injuries. PW-3, specifically denied the suggestion thrown at him that accident took place because of the fault of Maruti Car. PW-3 also testified that he could not say clearly as to which vehicle was at fault. In this conjecture, Hon'ble Apex Court, keeping an eye to the size and power of the two vehicles, took re-course of the doctrine of '***res ipsa loquitur'*** and came to the finding the truck was responsible for the accident in spite of head on collision between the truck and Maruti Car.

17. In ***Anumita Paul*** & ***Binapani Paul*** (supra) Hon'ble Division Bench of this Court, came across a case of head on collision between Qualish Car and Oil Tanker. In that case also Hon'ble Division Bench of this High Court took the assistance of ratio of ***Usha Rajkhowa*** (supra) and got rid of the issue of contributory negligence.

18. In the case in hand, I have come across an accident out of head on collision between a tourist bus and lorry. Mr. Banik has tried to make this Court understand, that there was no negligence on the part of the deceased driver of the bus and in support of his contention, he has referred to the evidence of one Sk. Lal Chand who has been examined as PW-2.

19. PW-2, testified that at the relevant point of time he was sitting in the cabin of the bus. PW-2 further stated that, the lorry coming from the opposite side in a random speed dashed the bus at its right portion and bus was along the left side of the road. In cross-examination, he has specifically stated that, he did not suppress or exaggerate any fact in the F.I.R lodged by him.

20. From the FIR (exhibit-iii), it is seen that accident took place on 09.02.2002 at about 2.45 a.m. and FIR was lodged within two hours on 09.02.2002 at Burdwan Police Station. Therefore, it is clearly presumed that, PW-2 lodged FIR almost immediately after the accident. Now turning to FIR, I find that PW-2 stated that accident took place due to rash and negligent driving of both the tourist bus and lorry. So, the cases dealt with by the Hon'ble Apex Court and the High Court is not at all identical to that of ours. In our case, by no stretch of imagination, I can come to any conclusion applying the doctrine '***res ipsa loquitur'*** in view of the oral evidence of PW-2 who deviated from the facts stated in the FIR (exhibit-iii) during his evidence, after one year.

21. For the reasons, claimant i.e. heirs of deceased driver of the tourist bus cannot claim entire compensation from the insurer of the lorry as it is a case of contributory negligence.

22. Accordingly, I do not find any reason to interfere with the judgement and award passed by the Ld. Tribunal except the award towards future prospect, general damages and amount towards deduction on account of personal expenses.

23. In terms of age group of deceased, claimants are entitled to 40% of the annual income of the deceased at the time of death, towards future prospect. Admittedly, Sk.Samsul Haque passed away in motor accident leaving behind his wife and three children. Therefore, deduction towards personal expenses should be 1/4th instead of 1/3rd of total income. Claimants are also entitled to Rs. 70,000/- towards general damages. In view of the principle laid down in ***Sarla Verma and others vs. Delhi Transport corporation and another (2009 (2) T.A.C 677 SC***).

24. In the aforesaid view of the matter, Oriental Insurance Company is liable to pay 50% of the total awarded amount modified as follows:-

Monthly income	:Rs. 4,500/-
Annual income (Rs.4,500/- X12)	:Rs. 54,000/-
Future prospect 40%	:Rs. 21,600/-
Total income	:Rs.75,600/-
Deduction 1/4th (personal expenses) (75,600-18,900)	:Rs. 56,700/-
Multiplier 16 (56,700X16)	:Rs. 9,07,200/-
General damages	:Rs. 70,000/-
Total of Rs.	:Rs. 9,77,200/-
Less: Already received	:Rs. 3,12,000/-
Balance amount	Rs. 6,65,200/-

25. As, I find from the record that Oriental Insurance Company already paid Rs. 3,12,000/- to the claimants as per order of Ld. Tribunal, therefore, Oriental Insurance Company is now liable to pay rest awarded amount of Rs. 1,76,600/- to the claimants.

26. Claimants are entitled to received Rs. 1,76,600/- along with interest @ 6% per annum from the date of filing of the Claim petition till the deposit of the amount.

27. Oriental Insurance Company is directed to pay the rest awarded amount of Rs. 1,76,600/- along with interest @ 6% per annum from the date of filing of the claim petition till deposit with the office of the Ld. Registrar General, within 6(six) weeks from the date.

28. Ld. Registrar General is request to disburse the deposited amount in favour of the claimants in equal share as minors have already attained the age of majority by the laps of time.

29. With the above observation, the appeal, F.M.A. 1574 of 2008 is being disposed of without any order as to cost.

30. All pending applications, if any, stand disposed of accordingly.

31. Let the records of the Tribunal along with a copy of this order, be transmitted back at once.

32. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]