21.09.2022
SL No. 5
Court No. 654
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F.M.A. 2095 of 2014

Sri Baidyanath Dhak & Anr.
versus
New India Assurance Co. Ltd. & Ors.

Mr. Krishanu Banik
……For the appellants.
Mr. Sanjoy Paul
….For the respondent no.1-Insurance Co.

This appeal is directed against the judgement and award dated 30th November, 2013 passed by learned Judge, Motor Accident Claims Tribunal (Redesignated) Court, Bankura in MAC case no. 16 of 2012/80 of 2011 granting compensation in favour of the claimants to the tune of Rs. 84,000/- under section 166 of the Motor Vehicles Act,1988.

The brief fact of the case is that on 03.04.2011 at about 5:15 p.m. while the victim was proceeding on Bankura-Durgapur main road as a pillion rider on the motor cycle driven by her husband and reached near Kadmaghati Village the offending vehicle bearing No. A.P.-16/TX/4139 (truck) dashed the motor cycle of the deceased's husband in a rash and negligent manner resulting in death of the deceased on the spot. The claimants being the parents-in-law filed application under section 166 of the Motor Vehicles Act, 1988 for compensation.

Upon consideration of materials on record and the evidence, oral and documentary adduced on behalf of the claimants, the learned tribunal allowed the claim application directing respondent no. 1-New India Assurance Company Ltd. to make payment of Rs. 84,000/- to the claimants.

Being aggrieved by and dissatisfied with the impugned judgement and award, the claimants have preferred the present appeal for enhancement of the compensation amount.

Mr Krishanu Banik, learned advocate for the appellants submits that the accident has taken place in the year 2011 and as per various decisions of this Hon'ble court the income of the deceased should be considered @ 4,000/- per month which has been wrongly assessed by the learned tribunal to the extent of Rs. 3,000/- per month. He further submits that at the time of accident the deceased was aged more than 25 years and was self-employed house wife and thus as per the observation of the Hon'ble Supreme Court made in ***National Insurance Company Ltd. versus Pranay Sethi and Ors.*** reported in ***2017 ACJ*** **2700** an amount equalling to 40% of the annual income should be taken into consideration towards future prospect and the multiplier to be adopted for calculation of compensation should be 17 as per observation of Hon'ble Supreme Court passed in ***Sarla Verma versus Delhi Transport Corporation*** reported in ***(2009) 6 SCC 121***. Furthermore, he submits that the learned tribunal failed to take into account compensation under conventional heads namely funeral expenses of Rs. 15,000/- and loss of estate of Rs. 15,000/-. He further submits that the finding of the learned tribunal that the deceased was guilty of contributory negligence in the said accident is totally baseless, in view of the fact that no cogent evidence has been led by insurance company in order to establish the contributory negligence of the deceased. As per the settled proposition of law the insurance company is under legal obligation to establish contributory negligence by leading positive evidence in order to derive benefit of such defence and in support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Mohammed Siddique & Another versus National Insurance Company Ltd & Others*** reported in ***1(2020) ACC 345 (SC)*** and ***Kumari Kiran Thr. Her Father Harinarayan versus Sajjan Singh and Others*** reported in ***2014 (4) T.A.C. 684 (SC).*** Thus the insurance company has failed to establish contributory negligence of the deceased in the said accident. Whereas on the flip side the evidence of eye witness adduced on behalf of the claimants would clearly show that the accident took place due to rash and negligent driving on the part of driver of the offending vehicle. In the light of the aforesaid submissions, he prays for enhancement of the award of compensation by modifying the judgment and award of the learned tribunal.

Mr. Sanjoy Paul, learned advocate for respondent no. 1-New India Assurance Company Ltd. at the first instance submits that the purported eye witness (PW-2) who adduced evidence on behalf of the claimants has neither been examined by the police nor has been shown as witness in the charge-sheet filed by the investigating agency and, therefore, his evidence in relation to the manner of occurrence is unreliable and cannot be accepted in law. He fairly submits that although no evidence from the side of insurance-company has been adduced in support of its specific plea of contributory negligence yet admittedly on the date of incident the deceased-victim was travelling in the motor-cycle along with her husband and child (i.e three persons) violating the terms and conditions of the insurance policy and thus have contributed to the negligence and therefore the insurance company cannot be held liable to pay compensation. Furthermore he submits that neither there is any evidence of dependency nor income of the deceased has been proved and as such, the learned tribunal has rightly assessed the income of the deceased to the tune of Rs. 3,000/- per month. In the light of his aforesaid submissions he prays for affirming the order of the learned tribunal.

Mr. Rajesh Singh, learned advocate for the respondent no. 2-National Insurance Company Ltd. submits that the respondent no. 2, has not been made liable by the learned tribunal for payment of compensation and he leaves the matter to the discretion of the court.

At the first instance, it is to be considered in the appeal whether the deceased was guilty of contributory negligence in the said accident or not. Respondent No.1 New India Assurance Company Ltd. in its written statement at paragraph no. 14 has taken the plea that the motor cycle rider had contributory negligence on his part for the said accident. However, no such evidence has been led by respondent no.1-New India Assurance Company Ltd in support of its specific ground taken of contributory negligence in its written statement and to establish the factum of contributory negligence on the part of the deceased. It is trite law that one who pleads certain fact is to prove the same and discharge its burden of proof, however, in the case at hand the respondent no.1-New India Assurance Co. Ltd has failed to discharge such burden. Mr. Paul, learned advocate for respondent no.1-New India Assurance Company Ltd. referring to the evidence of (PW-2) tried to impress upon the court that his evidence cannot be accepted as he is not a charge-sheeted witness. I fail to accept such proposition, in view of the fact that even if PW2 is not a charge-sheeted witness that *per se* will not lead to discounting of his evidence which is otherwise reliable. It is pertinent to note that the evidence deposed by PW-2 in his examination-in-chief with regard to the manner of occurrence and that the accident occurred due to fault of the driver of the offending vehicle has remained unshaken in cross-examination of the witness. No substantial materials have cropped up in the cross-examination of PW2 to disbelieve and dismiss his evidence. From the certified copy of charge-sheet **(Exhibit 1)** it appears that the investigating agency has submitted charge-sheet against the driver of the offending vehicle on the basis of *prima facie* materials under Sections 279/304A/427 of the Indian Penal Code. Mr Paul, learned advocate for respondent no.1-New India Assurance Co. Ltd strenuously argues that as there was violation of terms and conditions of the insurance policy by the deceased-victim by travelling in the motor-cycle with her husband and child (i.e three persons) hence there was contributory negligence on the part of the deceased-victim. The fact that the deceased was travelling in on a motor-cycle along with her husband (driver) and her child cannot by itself make her guilty of contributory negligence. At the most she can be guilty of violation of law. Therefore, in the absence of substantial proof and evidence to show that there was wrongful act on the part of the deceased-victim contributed either to the accident or to the nature of injuries sustained, the victim could not be held guilty of contributory negligence. I find substance in the submission of Mr. Banik, learned advocate for the appellants relying on the decisions of Hon'ble Supreme Court passed in ***Mohammed Siddique (supra)*** and ***Kumari Kiran (supra).*** Hence the deduction towards contributory negligence by the learned tribunal is clearly unjustified and the same has to be set aside.

Now the aspect of quantum of compensation is taken up for consideration.

With regard to the income of the deceased the learned tribunal has assessed the income to the tune of Rs. 3,000/- per month. However, bearing in mind the prices prevailing in the year 2011 when the accident took place, the income of the deceased is assessed @ Rs. 4,000/- per month.

It is found from the impugned judgement that no such amount has been taken into account with regard to future prospect. In view of decision of Hon'ble Supreme Court passed in ***Pranay Sethi (supra)*** as on the date of accident, the deceased was aged more than 25 years, there should be an amount equalling to 40% of the annual income towards future prospect.

The learned tribunal has adopted the multiplier 7, taking into consideration the age of the claimants-petitioners, however, following the decision of the Hon'ble Supreme Court passed in ***Sarla Verma (supra)*** the multiplier should be 17 taking into consideration the age of the deceased.

The general damages under the conventional head, namely, funeral expenses of Rs. 15,000/- and loss of estate of Rs. 15,000/- is also to be taken into account in view of the decision of the Hon'ble Supreme Court passed in ***Pranay Sethi (supra).***

In the aforesaid backdrop the compensation amount is calculated hereunder:

Calculation of Compensation

Income................................Rs.4000/-
Annual income (4,000/- X 12).........Rs.48,000/-
Add: 40% of annual income-Future Prospect...Rs.19,200/-
Total Rs.67,200/-
Deduction of 1/3rd towards
Personal living expenses Rs. 22,400
Rs.44,800/-

Adopting multiplier 17 (44,800/- X 17).. Rs. 7,61,600/-
Add: General Damages...........................Rs.30,000/-
Funeral Expenses....Rs 15,000/-
Loss of Estate..........Rs. 15,000/-
Total Compensation...................Rs. 7,91,600/-

Thus the claimants are entitled to compensation amount to the tune of Rs.7,91,600/- alongwith interest

@ 6% per annum from the date of filing of the claim application till realization.

It is informed that the claimants have already received an amount of Rs. 84,000/- as directed by the learned tribunal. Therefore, respondent no.1- New India Assurance Company Ltd. is directed to deposit a sum of Rs. 7,07,600/- (Rs.791,600/- less Rs.84,000/-) alongwith interest @ 6% per annum from the date of filing of the claim application till realization. The amount of Rs. 84,000/- already disbursed in favour of the claimants will also carry interest @ 6% from the date of filing of the claim application till the date such deposit was made before the learned tribunal.

Respondent No. 1-New India Assurance Company Ltd. is directed to deposit the aforesaid amount by way of cheque with the learned Registrar General, High Court, Calcutta within six weeks from date. Upon deposit of the said amount the learned Registrar General, High Court, Calcutta shall release the amount in favour of the appellants-claimants in equal share upon satisfaction of the identity of the claimants.

With the aforesaid observations, the appeal is allowed to the extent as discussed above and is disposed of.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Lower Court Records be sent down to the learned tribunal alongwith the copy of the judgment forthwith.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on complying all necessary legal formalities.

(Bivas Pattanayak J.)